EDITOR'S NOTE

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No. 84-6646-CFH
Status: GRANTED
CAPITAL CASE

Title: Willie Lloyd Turner, Petitioner
v.
Allyn R. Sielaff, Director, Virginia Department of Corrections

Court: United States Court of Appeals for the Fourth Circuit

Docketed:
April 24, 1985

Counsel for petitioner: Sneed III, J. Lloyd

Counsel for respondent: Kulp, James E.

Entry	Date	Note	Proceedings and Orders
1	Apr 24 1985	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Apr 25 1985		Brief of respondent Bass, Supt. in opposition filed.
4	May 3 1985		REDISTRIBUTED. May 6, 1985
5	Apr 30 1985		Application to vacate stay filed.
6	May 1 1985		Response of Willie L. Turner filed.
7	May 2 1985		Order denying application to vacate stay by Burger, CJ., with statement.
9	May 13 1985		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
10	May 20 1985	G	Motion of petitioner for appointment of counsel filed.
11	May 24 1985		DISTRIBUTED. May 30, 1985. (Motion of petr. for appointment of counsel).
12	Jun 3 1985		Motion for appointment of counsel GRANTED and it is ordered that J. Lloyd Sneed III, Esquire, of Charlottesville, Virginia, is appointed to serve as counsel for the petitioner in this case.
13	Jul 24 1985		Joint appendix filed.
14	Jun 24 1985		Brief of petitioner Willie Lloyd Turner filed.
15	Aug 9 1985		Brief of respondent Allyn R. Sielaff, Dir., VA DOC filed.
16	Aug 16 1985		Lodging received.
17	Sep 26 1985		Record filed.
18	Oct 18 1985		CIRCULATED.
19	Oct 22 1985		SET FOR ARGUMENT, Wednesday, December 11, 1985. (3rd case).
20	Nov 9 1985	N	Motion of petitioner to strike ex parte affidavit filed.
21	Nov 18 1985		DISTRIBUTED. Nov. 27, 1985. (Above motion).
22	Nov 20 1985		Opposition of to motion of petitioner to strike ex parte affidavit filed.
23	Nov 25 1985	X	Reply brief of petitioner Willie L. Turner filed.
25	Dec 9 1985		RESCHEDULED FOR ARGUMENT, Thursday, December 12, 1985. (third case).
26	Dec 12 1985		RULED.
27	Dec 2 1985		Further consideration of the motion of petitioner to strike ex parte affidavit is deferred to the hearing of the case on the merits.
28	Dec 2 1985		

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

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84 6446

WILLIE LLOYD TURNER,

Petitioner,

v.

GARY BASS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Counsel for Petitioner
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QUESTIONS PRESENTED

1. Where a capital murder case is being tried in a rural county in a state where the death penalty has historically been imposed in a racially discriminatory manner, and where the death sentence is being sought for a black man who is accused of killing a white man, must the trial court grant the defendant's request that the prospective jury members be questioned about their racial prejudices?

2. Does "death qualification" result in a jury biased toward the prosecution on the issue of guilt, thereby depriving a defendant of his right to a fair and impartial jury?

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ASSIGNMENTS OF ERROR

1. The trial court's failure to voir dire the jury concerning their racial prejudices denied Petitioner his right to a fair and impartial jury, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

2. The process of "death qualification" resulted in a jury biased in favor of the prosecution on the issue of guilt, denying Petitioner his right to a fair and impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3), in that Petitioner alleges violations of rights guaranteed him by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case presents violations of the Sixth and Fourteenth Amendments to the United States Constitution, which are set out, in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...

U.S. CONST. AMEND. VI.

> No State shall...deprive any person of life, liberty, or property, without due process of law...

U.S. CONST. AMEND. XIV.

STATUTES INVOLVED

The Virginia death penalty statutes, Va. Code Ann. SS 18.2-31 and 19.2-264.2 et seq. (1977 Supp.), are set forth in the appendix attached to this Petition.

STATEMENT OF THE CASE

Throughout this Petition for Writ of Certiorari, Petitioner will refer to the appellate record in the Fourth Circuit proceedings with the designation "App."

On July 12, 1978, W. Jack Smith was killed in the Town of Franklin, in the County of Southampton, Virginia. Petitioner

Willie Lloyd Turner was arrested and charged with capital murder, robbery, and using a sawed-off shotgun in the commission of a robbery. Because of prejudicial pre-trial publicity in Southampton County, the trial was moved to Northampton County, a thinly populated rural county on Virginia's Eastern Shore. The trial began on December 3, 1979. On December 4, 1979, the jury found Petitioner guilty of all charges. On December 6, 1979, the jury fixed his punishment at death. On February 6, 1980, Judge Godwin imposed the sentence of death upon Petitioner.

Petitioner's conviction and sentence were affirmed by the Virginia Supreme Court, Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), cert. denied, 451 U.S. 1011 (1981).

Petitioner's Petition for Writ of Habeas Corpus in the Circuit Court for the County of Southampton was denied, without an evidentiary hearing, and the Virginia Supreme Court refused the appeal. This Court denied a Petition for Writ of Certiorari. Turner v. Morris, cert. denied, ___ U.S. ___, 77 L.Ed.2d 1341 (1983).

On July 27, 1983, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Virginia, Norfolk Division, the Honorable John A. MacKenzie, presiding. Judge MacKenzie heard argument, denied Petitioner's motion for an evidentiary hearing, and entered an order dated May 23, 1984, denying relief but granting a certificate of probable cause. Petitioner then filed a Motion to Alter or Amend the Judgment, which was denied by order dated July 19, 1984.

The Fourth Circuit Court of Appeals affirmed the District Court's judgment by order dated January 25, 1985. The Fourth Circuit also stayed the issuance of the mandate until March 17, 1985. An application has been made for a stay of execution pending this Court's disposition of this Petition for Writ of Certiorari. An execution date has been set by the Circuit Court for the County of Southampton for May 2, 1985.

STATEMENT OF FACTS

On July 12, 1978, Willie Lloyd Turner, a black man, walked into Smith Jewelers in Franklin, Virginia, in the County of Southampton. Brandishing a sawed-off shotgun, he demanded that the proprietor, W. Jack Smith, a white man, fill up some bags with jewelry. Smith triggered the silent alarm, and moments later Officer A. D. Bain, Jr., arrived. Officer Bain walked in, unsuspecting; Turner then disarmed him and told him to stand in the back of the store with the rest of the customers who had been in the store at the time that Turner walked in. At Turner's order Smith began to fill bags with jewelry (App. 647-648), when Turner apparently became concerned about the possibility that other police officers would come in the back. He fired a pistol shot into the back wall of the store (App. 564). Officer Bain tried to reassure Turner that no police officer was going to come in the back; Bain testified that, at that point, Turner stated that "if he saw or heard any more police officers, he was going to start killing. About that time, I heard a siren go off." App. 648-649. Turner apparently panicked, and fired Bain's service revolver at Smith, the shot grazing Smith's scalp (App. 639). Smith fell to the floor.

In the confusion, one customer and one employee were able to sneak out the front door. Bain tried to talk to Turner, but Turner merely got angry. He said "I'm going to kill that nigger for snitching on me." (App. 569), and he shot Smith, who was lying on the floor, twice through the chest from the back. The two shots were fired in rapid succession, one right after the other (App. 652). Either of the two shots to the chest would have been fatal (App. 642). As Turner turned away from Smith, Officer Bain attacked him, disarmed him and placed him under arrest (App. 653).

After indictment, psychiatric evaluation, and a change of venue to Northampton County, Turner was brought to trial in December, 1979. The trial court conducted all voir dire, from written questions submitted by counsel. Turner's counsel submitted a number of questions (App. 8-9), including the following:

> (10) The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?

The Court refused to voir dire the venire on their racial attitudes, to which refusal counsel objected (App. 495).

During voir dire, defense counsel made repeated motions for more extensive voir dire; all such motions were denied. The defense counsel objected to "death qualifying" the jury (App. 486-488); the objection was overruled, the trial court did conduct death qualification and three jurors were excluded for cause under the authority of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

ARGUMENT

The major issue presented in this case is whether the trial court in a capital case must, upon timely motion, voir dire the jury as to possible racial prejudice.

Petitioner does not here claim that the Virginia death penalty statutes are unconstitutional because they are discriminatorily applied; the argument is much more narrow. Because the death sentence has historically been imposed in Virginia in a racially discriminatory manner, and because the jury's decision to impose the death sentence is not made merely by applying the law to the facts but also by acting as the conscience of the community, the courts must take affirmative steps to prevent the intrusion of racial prejudice into the decision-making process. Justice Powell (writing for himself, the Chief Justice, and Justices Blackmun and Rehnquist) indicated in his dissent in Furman v. Georgia, 408 U.S. 238, 450, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), that he agreed that the death penalty had in the past been applied in a discriminatory fashion. However, the dissent felt that the changes during the 1960's both in criminal procedure and in the extent of segregation made it inappropriate to strike down all of the statutes in the country on the basis of data accumulated over many years in a different legal and social climate.

The 19[illegible] dissent, therefore, impl[illegible]d that the process by which the death penalty is imposed is constitutional because, and only because, courts have taken steps to reduce the likelihood that racial prejudice will affect the death decision.

It is important to keep in mind the facts of this case, and to recognize that, when this case is compared with other capital murder cases, it would be characterized as a "mid-range aggravation" case, the type of case in which statistical studies indicate that racial prejudice is most likely to have an effect. This case is not a particularly heinous case -- it is basically a bungled robbery. In many jurisdictions in Virginia, a prosecutor would in all likelihood not even charge the crime as capital murder, and in any event would not seek the death penalty.[1]

I. VIRGINIA'S POST-FURMAN DEATH PENALTY STATUTES HAVE NOT ELIMINATED RACE AS A FACTOR IN THE JURORS' DECISION WHETHER TO IMPOSE DEATH.

Petitioner is a black man; his victim, W. Jack Smith, was a white man. The jury became aware of Mr. Smith's race when the Commonwealth introduced, through the medical examiner, a photograph (Commonwealth's Exhibit 10) of an entrance wound in Mr. Smith's head, a photograph (Commonwealth's Exhibit 11) of the exit wound from Mr. Smith's head, and a photograph (Commonwealth's Exhibit 12) of Mr. Smith's chest, showing two entrance wounds.[2] At trial, Petitioner requested the court to ask the prospective jurors the following question:

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[1] This statement is based upon simple observation, conversations with various prosecutors, and a comparison of the instant case with the other capital murders cases in which death was imposed. A review of those cases shows that the death penalty is not returned in Virginia in a case of murder in the course of a robbery unless there is more than one victim, see Stamper v. Commonwealth, 220 Va. 260, 256 S.E.2d 808 (1979), cert. denied, 445 U.S. 972 (1980); the robbery involves entry into a residence, see Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d 643 (1982), cert. denied, 460 U.S. 1029 (1983), or the method of killing was particularly gruesome or horrifying, see Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 643 (1979), cert. denied, 444 U.S. 1103 (1980).

[2] The defense objected to the photographs on the ground that they would inflame or prejudice the jury, but that objection was overruled. The Virginia Supreme Court affirmed. Turner v. Commonwealth, 221 Va. 513, 531, 273 S.E.2d 36 (1980), cert. denied, 451 U.S. 1011 (1981).

> The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?

The court refused to question the venire panel about racial prejudice.

A. The Death Penalty Has Historically Been Applied In A Discriminatory Fashion In Virginia.

There can be little question that, before Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the death sentence was being applied in Virginia in a racially discriminatory fashion.

Before the Civil War, the Virginia Code provided for different punishment for whites, free blacks and slaves.

> Virginia law at the outbreak of the Civil War divided criminals into three classes. For whites, the law authorized capital punishment only for murder, treason, and arson. Free Negroes could receive the death penalty for these three offenses plus rape and attempted rape, if the victim were white. In addition, the state could execute slaves for burglary, armed robbery, kidnapping and any other offense which was punishable by imprisonment for more than three years if committed by a free man.

Note, "Capital Punishment In Virginia," 58 Va. L. Rev. 97, 104-105 (1972).[3]

Following the Civil War and the enactment of the Fourteenth Amendment, the Virginia General Assembly abolished the clear race-dependent differences, added burglary, armed robbery,

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[3] The Virginia General Assembly in the 1800's considered the "death worthiness" of certain cases be a function not only of the race of the offender but also of the race of the victim.

> The statutes governing rape offenses were atypical, because there was a specific statute dealing with the rape of a white woman by a black man. This law provided that if a slave or free Negro raped a white woman he was to be punished with death. The original penalty for the attempted rape of a white woman by a black man was castration, but later the legislature extended the death penalty to cover that crime also. In contrast, the law offered little protection

rape and (in 1894) attempted rape to the list of capital offenses, and controlled jury selection to guarantee all white juries.

> Since the legislature apparently felt it impolitic to distinguish penalties by race, they made the death penalty discretionary for these crimes, and placed their trust in the judgment of white judges and white juries.

Id. at 106.

In 1908, Virginia executions were centralized in the Virginia State Penitentiary, and the Department of Corrections has kept records of those who have been executed since then. (No authoritative data exists for pre-1908 executions.) Between 1908 and 1962, 236 people were executed in Virginia; 202 were black. Forty-one blacks were executed for rape, fourteen blacks executed for attempted rape, and five blacks executed for armed robbery. No whites were executed for those three offenses. Id. at 142.

When all Virginia death sentences were nullified in 1972 in Furman v. Georgia, there were eight men on Virginia's death row; five were black and three were white. Six were on death row for murder, and two (both black) were on death row for rape. Id. at 113 n.107.

Even more striking are the statistics correlating the imposition of the death sentence with the race of the victim. Between 1908 and 1972, no one was executed for a crime against a black victim.

In sum, therefore, the disparity on the basis of race of the offender or race of the victim in the imposition of the death sentence in Virginia before Furman v. Georgia was "sufficiently large" that "it is unlikely that it is due solely to chance or accident," Casteneda v. Partida, 430 U.S. 482, 494

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[3] (Cont.)

> to a black woman raped by a white man. The maximum penalty was only a term of imprisonment, and Negroes were incompetent by statute to testify against a white criminal defendant. Without the testimony of the victim, proving such essential elements of the crime of rape as force and penetration would obviously present certain practical difficulties.

Id. at 104.

n.13, 97 S.Ct. 272, 51 L.Ed.2d 498 (1977) This statistical disparity, combined with the history of racial discrimination in Virginia's courts, fully supports a conclusion that, at least before 1972, racial prejudice was an important factor in determining who was sentenced to death in Virginia.

B. When This Court Struck Down Death Penalty Statutes In 1972, The Action Was Based In Part Upon Evidence That The Death Penalty Was Being Administered Disproportionately To Blacks.

When this Court struck down capital sentencing procedures in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), five justices addressed race discrimination in their individual opinions. See 408 U.S. at 249-52 (Douglas, J., concurring); id. at 309-10 (Stewart, J., concurring); id. at 364-66 (Marshall, J., concurring); id. at 389-90 n.12 (Burger, C.J., dissenting); id. at 449 (Powell, J., dissenting).

The thrust of the argument to this Court in 1972 was that the death penalty was being imposed on the basis of race; this conclusion was supported by many statistical studies. See, e.g., H. Bedau, The Death Penalty in America (1967 rev. ed.); Hartung, "Trends in the Use of Capital Punishment," 284 Annals Am. Acad. of Pol. & Soc. Sci. (1952); R. Clark, Crime in America 335 (1970); Wolfgang, Kelly & Nolde, "Comparison of the Executed and the Commuted Among Admissions to Death Row," 53 J. Crim. L. Criminology & Police Sci. 301 (1962). Justice Marshall summarized the statistics as follows:

> It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination.

408 U.S. at 364. See also W. Bowers, Executions in America (1974).

Even the dissenters in Furman apparently conceded that the death sentence had historically been imposed pursuant to a racially discriminatory pattern. Justice Powell, writing for himself, Chief Justice Burger, Justice Blackmun, and Justice Rehnquist, called the "discriminatory application of the death penalty in the past admittedly indefensible." 408 U.S. at 450.

C. Although The Post-Furman Statutes Better Channel Jury Discretion, They Have Not Eliminated Racial Prejudice From The Minds Of Jurors.

In 1976, this Court approved new statutes that guided the discretion of the jury so as to eliminate the arbitrary and capricious manner in which death was being imposed. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

Since Gregg, many statistical studies have correlated death sentences with the race of the victim and the race of the offender. The lower federal courts have rejected these claims on their merits, McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc); Shaw v. Martin, 733 F.2d 304 (4th Cir. 1984); Sullivan v. Wainwright, 721 F.2d 316 (11th Cir. 1983); petition for stay of execution denied, ___ U.S. ____, 78 L.Ed.2d 210 (1983); Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983), cert. denied, ___ U.S. ____, 79 L.Ed.2d 203 (1984); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979).

These decisions have been based in part upon doubts about the sufficiency of the evidence to support a conclusion of disparate impact, McCleskey, supra, at 896; Sullivan, supra, at 213, and in part upon a holding that a death-sentenced inmate must show an actual intent to discriminate or "evidence of disparate impact...so strong that that the only permissible inference is one of intentional discrimination." Adams, supra, at 1449; see McCleskey, supra, at 892.

In all of these cases, the courts have received evidence of statistically significant disparities in the imposition of the death sentence, showing that, for what ever reason, blacks are more likely to receive the death penalty than whites, and those who kill whites are more likely to receive the death penalty than blacks.[4]

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[4] In the proceedings thus far, Petitioner has introduced two studies tending to show that the death penalty is being imposed discriminatorily upon blacks, and in particular on blacks who kill whites. At trial, Petitioner introduced a study by Bowers and Pierce (Defendant's Exhibit 1) (App. 954-980); after having been denied an evidentiary hearing on this issue, Petitioner introduced as an exhibit to his Motion to Alter or Amend Judgment the study by Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing in Homicide Victimization 15-32 (unpublished study) (October, 1983) (App. 377-433).

However, Petitioner's argument here is not that the death penalty must be abolished because of the existence of racial discrimination, but rather that states must recognize the potential for racial discrimination, and must take reasonable steps to prevent it from affecting the capital trial.

In 1972, Justice Powell, writing for himself, Chief Justice Burger, Justice Blackmun, and Justice Rehnquist, wrote that

> ...discriminatory application of the death penalty in the past, admittedly indefensible, is no justification for holding today that capital punishment is invalid in all cases in which sentences were handed out to members of the class discriminated against....
>
> A final comment on the racial discrimination problems seems appropriate. The possibility of racial bias in the trial and sentencing process has diminished in recent years. The segregation of our society in decades past, which contributed substantially to the severity of punishment for inter-racial crimes, is now no longer prevalent in this country. Likewise, the days past when juries do not represent the minority group elements of the community. The assurance of fair trials for all citizens is greater today than at any previous time in our history. Because standards of criminal justice have "evolved" in a manner favorable to the accused, discriminatory imposition of capital punishment is far less likely today than in the past.

408 U.S. at 450. Four members of the court were saying, in essence, that procedural guarantees may be relied upon to prevent racial prejudice from infecting a trial to the extent that it had in years past.

Justice Powell was obviously correct in stating that the level of segregation has declined in recent years, as blacks and whites have broken down the barriers of segregation. This Court's rulings in the area of school desegregation have, themselves, probably done more than anything else to bring about a change in the attitudes of prospective jurors.

However, no one can seriously contend that the desegregation of our schools, or of our juries, has eliminated racial prejudice from our society or from the minds of those who are called to serve on our juries. Neither this Court's decision in Furman nor the statutes enacted in response abolished racism.

Had there been any doubt that racial prejudice continues to affect people's perceptions of the validity of the death penalty in a given case, those doubts should have been dispelled by recent events in Virginia. On October 12, 1984, Linwood Briley was executed in Richmond, Virginia, as hundreds of whites stood outside the Virginia State Penitentiary waving Confederate flags and nooses, chanting "Burn, Briley, burn," and "Fry, nigger, fry." The Richmond News Leader reported:

> But race was an issue for some who came out last night. Two women carried signs that said "Kill the Negro." A white youth spiced his screams of "Fry 'em" with racial epithets and obscenities.

"Prison Vigil: Street Divides Advocates, Opponents of Death Penalty," Richmond News Leader, October 13, 1984, at 1, col. 1. The Washington Post reported:

> Ron Doggett, 23, a landscaper, waved a Confederate flag over his head. "We want to return to the days in Richmond when this flag flew proudly," he said.

"Sorrowful, satisfied Crowds Greet Briley Execution in Va.", Washington Post, October 14, 1984, at A1, col.3, A12, col.3. At the execution of James Briley on April 18, 1985, the same crowd gathered, wearing Nazi armbands and shouting "White power" and "Sieg Heil."

Recognizing that there are such people in Virginia, all that Petitioner asks is that he be entitled to learn whether those people have been called for jury duty when he goes to trial.

D. In Virginia And Across The Country, The Death Penalty Is Still Being Applied Disproportionately Against Blacks Who Kill Whites.

The revision of death sentence statutes after Furman has not ended race discrimination. The evidence is clear that the same racially discriminatory application is occurring post-Furman. Bowers & Pierce, "Arbitrariness and Discrimination under Post-Furman Capital Statutes," 26 Crime and Delinquency 563 (1980); See, e.g., Bowers, "The Pervasiveness of Arbitrariness and Discrimination under Post-Furman Capital Statutes," 74 J. Crim. L. & Criminology 1067 (1983); Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing

in Homicide Victimization 15-32 (unpublished study) (October, 1983) (introduced as an exhibit to Motion to Alter or Amend Judgment, App. 377-433).

At trial, Petitioner introduced a study by Bowers and Pierce (Defendant's Exhibit 1) (App. 954-980), showing the discriminatory manner in which the death sentence was being imposed in Georgia, Florida, Texas, Alabama and Ohio. In those five states, the probability of receiving the death sentence for homicide between the effective date of the various states' post-Furman statutes through December, 1977, was correlated with the race of the victim and of the offender. For example, the death sentence was imposed in 377 of 9,094 cases in which a white was killed, or 4.15% of the cases. The offender received the death sentence in 53 of 9,850 cases in which the death sentence was imposed, or .54% of the cases. In short, if someone kills a white, he is eight times more likely to receive the death sentence than if he kills a black. Similar aggregate totals may be computed for each of the offender/victim racial combinations:

	Estimated Number of Offenders	Persons Sentenced to Death	Probability of a Death Sentence
Black kills White	1,131	165	14.59%
White kills White	7,963	212	2.66%
Total -- White Victim	9,094	377	4.15%
Black kills Black	9,451	51	.54%
White kills Black	399	2	.50%
Total -- Black Victim	9,850	53	.54%
Total -- All Victims	18,944	430	2.31%

The numbers are similar if the class of cases is narrowed somewhat to include only felony-type murders.

	Estimated Number of Offenders	Persons Sentenced to Death	Probability of a Death Sentence
Black kills White	443	100	22.57%
White kills White	857	123	14.35%
Total -- White Victim	1,300	233	17.15%
Black kills Black	441	17	3.85%
White kills Black	50	2	4.00%
Total -- Black Victim	491	19	3.87%
Total -- All Victims	1,791	242	13.47%

This data reveals a very strong likelihood that the race of the offender and the race of the victim (and, in particular, the combination of those two variables) will have a very large effect upon whether a particular defendant receives the death sentence. This is true across the country, as the survey data from Georgia, Florida, Texas, Alabama and Ohio shows.

Bowers & Pierce did not study Virginia death sentences. However, Gross & Mauro did study the Virginia death sentences in nineteen cases, as compared to 1,389 homicides. The results, in rough statistical terms, show that one who kills a white is four times more likely to receive the death sentence than one who kills a black (2.3% to 0.5%). If a black kills a white, he has an 8.2% chance of receiving the death penalty; if a white kills a white, he has a 1.3% chance of receiving the death penalty; if a black kills a black, he has a 0.6% chance of receiving a death penalty; and no white has received the death penalty for killing a black since Virginia's new statute was enacted in 1977.[5]

Because the death penalty had been imposed in only 19 cases during the time period under study, Gross and Mauro were not able to label their data for Virginia statistically significant. However, Gross and Mauro found that Virginia's data was consistent with the data from other states - an observation which is also consistent with the observation that Virginians (despite their occasional protestations to the contrary) are basically the same kind of people, with the same kinds of prejudices, as other Americans. The fact that the data for Virginia is not statistically significant because of the small sample size is therefore not relevant - our claim is dependent upon human nature, not a particular statute. The sample size for all of Gross and Mauro's studies, as for all of Bowers and Pierce's studies, is more than adequate to show the disparate impact.

In any event, because we are not asking this Court to invalidate the Virginia death penalty statute, but rather only to

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[5] James Briley's execution on April 18, 1985, marks the first time in Virginia that anyone had been executed for murder of a black.

recognize that there are still people in this world who regard the death penalty as more appropriate for blacks who kill whites than for other combinations of offenders and victims, there is nothing about this argument that statute-specific or state-specific. There is nothing about the Virginia death penalty statute, as opposed to the statutes of North Carolina, South Carolina or any other state, which make it more or less likely that racial prejudice will motivate a juror to return a verdict of death. Nor can it seriously be suggested that the ethos of the citizenry of Virginia is significantly different of that of any other southern state.[6]

All of the data, taken together, show clearly that those who kill whites are far more likely to receive the death penalty than those who kill blacks.

There are currently 27 men on Virginia's death row; four have died while on death row (three by execution). Of those 31 men, 18 are black, one is Asian, one was Mexican and 11 are white.

The statistics just mentioned are admittedly not conclusive in Virginia to justify the drastic step of declaring the Virginia system to be unconstitutional. However, the data clearly indicate a tendency that courts must take active measures to counter. Courts must be vigilant to potential racial influences in a trial, and these influences must be eliminated wherever possible.

All of the evidence indicates, in virtually every sample of any size, that the death penalty is imposed disproportionately upon those who kill whites. Most analyses show that blacks are more likely to receive the death penalty than whites. See Gross & Mauro at 91-98. (App. 419-433.)

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[6] Or that of most other states across the country. Racism has long been a particular problem in the South, but is by no means unique to the South. The data offered at trial from Professors Bowers and Pierce (see App. 954) shows that racially discriminatory application was suggested in Ohio as well as in four southern states.

II. THE TRIAL COURT SHOULD HAVE QUESTIONED PROSPECTIVE JURORS CONCERNING RACIAL PREJUDICE.

This Court's decision in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), together with the other cases decided that day, may be interpreted as saying, in essence, that the death penalty is permissible because, and only because, the newly redrafted statutes effectively channel the discretion of the jury. This Court assumed in Gregg that the state trial and appellate courts would exercise stricter review of the jury-imposed death sentences; that review would be more searching than usual, and would be particularly attuned to suggestions of arbitrariness or prejudice.

The extra solicitude shown in capital cases was highlighted in Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 793 (1978):

> 'The penalty of death is qualitively different' from any other sentence. [Woodson v. North Carolina, 428 U.S. 280, 305 (1976)]. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.

While the extra degree of reliability sought does not translate into any difference in substantive standards, it implies that courts will take greater procedural precautions. Where there is a way to avoid prejudice, it should be taken. If the "extra degree of reliability" means anything, it means that the courts should bend over backwards to make sure that possible elements of prejudice or discrimination are eliminated.

This Court has held that a defendant has a constitutional right to have veniremen examined on racial prejudice when there is some "special circumstance" about the trial that makes it likely that racial attitudes will be relevant. In Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973), this Court reversed a conviction of a black civil rights worker in South Carolina who had been charged with possession of marijuana. His defense was that he had been framed in retaliation for his civil rights activities. He had asked that the jury be

examined on racial attitudes, and that request was denied. The Court unanimously agreed that voir dire on racial prejudice was constitutionally required in this case but rejected the notion that voir dire should have been required on whether the jurors were biases against people who wore beards. The Court obviously did not regard the possibility of prejudice against those wearing beards to be a matter of constitutional significance; the Court referred to the history of racial discrimination and the protection given by the Fourteenth Amendment to blacks in particular in drawing the distinction.

In Ristaino v. Ross, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d (1976), the Court held that voir dire on racial prejudice was not constitutionally required, where the only factor that seemed to call for such voir dire was the fact that it involved a black defendant charged with armed robbery and assault upon a white security guard. The Court interpreted Ham as follows:

> By its terms Ham did not announce a requirement of universal applicability. Rather, it reflected an assessment of whether under all of the circumstances presented there was a constitutionally significant likelihood, absent questioning about racial prejudice, that the jurors would not be as 'indifferent as [they stand] unsworne.'

424 U.S. at 596.

The last decision by this Court of relevance is Rosales-Lopez v. United States, 451 U.S. 182, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981), in which this Court held, as a matter of its supervisory powers over federal courts, that

> [f]ederal trial courts must make such an inquiry when requested by a defendant accused of a violent crime where the defendant and the victim are members of different racial or ethnic groups.

451 U.S. at 192. The court rejected the notion that there was a constitutional requirement for voir dire on racial attitude in that case, which involved a Mexican who was helping other Mexicans to illegally enter the United States.

> Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with [racial prejudice] amount to an unconstitutional abuse of discretion.

451 U.S. at 190.

The question, therefore, is whether there is any "special circumstance" that makes it likely that racial prejudice will be an issue in this case.

The Fourth Circuit rejected this contention:

> There must exist some special circumstance in the facts surrounding a particular case before such voir dire is constitutionally required. We are of opinion that the nature of the crime or punishment itself is not a special circumstance. Nor is the fact that the victim is white and the defendant black, as Ristaino specifically so held. We are also of opinion that the fact that a larger percentage of white victims' assailants are executed than are other races is not a special circumstance. "There is no constitutional presumption of juror bias for or against members of any particular racial ethnic groups."

Turner v. Bass, 753 F.2d 342, 345 (4th Cir. 1985) (citing Rosales-Lopez, supra, 451 U.S. at 190.)

Judge Phillips noted in his concurrence that he agreed with the ruling of the Fourth Circuit, though he would make clear that particularized data relating specifically to jury prejudice at the time and place of trial might well constitute grounds for voir dire on that issue.

A. Ristaino v. Ross Should Not Be Applied In Jury Sentencing Cases.

Massachusetts, the state where Ristaino v. Ross originated, is not a jury sentencing state. A Massachusetts jury determines only guilt or innocence. Only a handful of states, Virginia among them, retains jury sentencing in non-capital cases; all of the states with death penalties provide for at least a recommendation of sentence by a jury. In Virginia, a jury's recommendation can only be reduced; it cannot be increased.

Jurors perceive blacks and whites differently. In their classic study, Kalven & Zeisel noted that jurors tend to be less sympathetic to black defendants than to white defendants; less sympathetic jurors are more likely to convict, and are more likely to impose the death sentence. H. Kalven and H. Zeisel, The American Jury 210 (1966). Jury sentencing trials necessari-

ly involve asking the jurors to act as the conscience of the community in imposing punishment. They are not only applying facts to issues of law in determining guilt; they are also, to a certain extent, defining the law of punishment. When a jury is faced with a range of punishment from one day to ten years in jail, there are no strict legal standards governing their decisions. Whether the jury recommends one day in jail or 10 years in jail is a function of purely subjective impresisions of whether the jurors like, respect, trust, excuse, emphathize with, or take pity on a defendant. They are shaping very rough subjective standards into a collective community standard -- the conscience of the community. If that conscience reflects racial prejudice,[8] there is an unacceptably greater chance that the black defendant will be more harshly treated.

The Supreme Court has noted, see Gregg v. Georgia, 428 U.S. 151, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), that a sentencing jury must weigh retribution, deterrence, and other matters of social policy. These are proper concerns for a sentencing jury, and are irrelevant to any other decision that any other jury would be called upon to make. Ristaino v. Ross should not be applied to jury sentencing cases.

B. Ristaino v. Ross Should Not Be Applied In Capital Cases.

Petitioner has suggested above that a black defendant accused of a violent crime against a white should be allowed to voir dire the jurors on racial prejudice in any case in which the jury can recommend sentence. That argument is admittedly based upon abstractions of theory rather than statistics.

However, if this Court does not wish to go that far, the intermediate is simply to extend the guarantee of a fair jury to all those charge with capital murder.

This Court, in Rosales-Lopez, 451 U.S. at 190, held that

> an alleged criminal confrontation between a black assailant and a white victim...did not create a need of "constitutional dimensions"

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[8] Of course, racial prejudice is no more permissible in a juror merely because it is an attitude widely held in the community.

> to question the jury concerning racial prejudice. There is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups.

From the tone of this Court's opinion in Rosales-Lopez v. United States, it appears likely that the defendant there made no attempt to introduce evidence to establish the likelihood of racial prejudice. In the absence of any evidence, and there being no presumption of racial prejudice, there was no basis in the record for any finding that the defendant was entitled to such voir dire.

Here, however, we are not asking the courts to indulge in a "presumption" of the prejudice; we ask only that actual evidence offered be considered. It appears from this Court's opinions in Rosales-Lopez and Ristaino that no evidentiary showing was made in support of "the presumption of juror bias." We do not ask this Court to assume anything, or to presume anything. We ask only that this Court look at the fact. We have introduced evidence in support of our claim, evidence that is credible, reliable, and unchallenged. No evidentiary hearing has yet been held on this issue. This case is therefore not governed by Ristaino and Rosales-Lopez.

Appellant prays this Court to fashion one of three rules:

1. That voir dire on racial attitudes is always to be granted in cases in which the jury sets sentence, upon proper request from the defendant and where the defendant and the victim were of different races; or

2. That voir dire on racial attitudes is always to be granted in capital cases upon proper request from the defendant where the defendant and the victim were of different races;[9] or

3. In this particular case, where a black has been accused of killing a white in a small rural community, with a trial to be held in a small rural community, and with enough

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[9] The Georgia Supreme Court apparently already regards this as its constitutional obligation. See Henderson v. State, 251 Ga. 398, 306 S.E.2d 645 (1983), citing Ham, supra, and Reid v. State, 129 Ga. App. 657, 200 S.E.2d 454, 455 (1973).

passion involved in the case that one change of venue has already been required, voir dire on racial prejudice on timely motion should have been permitted.

In either event, Appellant's conviction and sentence must be reversed, and this case must be remanded for a new trial.

In a capital case, in which the jury imposes the sentence, the decision to impose the death sentence is intended to be, and in fact becomes, an effort to gauge the communal sense of retribution. A majority of the justices of this Court have agreed that retribution is a valid penological purpose served by the death penalty. See Furman v. Georgia, 408 U.S. at 453 (Powell, J., dissenting) (joined by Burger, C.J., Blackmun, Rehnquist, JJ.); Gregg v. Georgia, 428 U.S. 153, 183, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (Stewart, Powell, Stevens, JJ., concurring).

Virginia's "vileness" criterion is expressly intended to address the question of retribution. Whether the defendant's conduct was "outrageously or wantonly vile, horrible or inhuman" is a question that is intended to, and does in fact, focus the jury's deliberations on the degree of horror and revulsion which they feel about the crime and the defendant.

All across the South, blacks accused of crimes against whites have known all too often the power of racially motivated retribution. Within the legal system, this disproportionate sense of retribution has led to a wide disparity in sentencing, as jurors have valued white lives more than black lives.[10] Outside the court system, blacks all across the south were often lynched

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[10] The statistics cited in Argument I, supra, are disturbing as indicators of prejudice, but they to a certain extent obscure the rabid feelings held by some. Perhaps the classic statement of how racial prejudice affects the criminal justice system is provided by Raymond Fosdick, a student of southern police methods in the early 1900's. One Southern policeman told Fosdick that "if a nigger kills a white man, that's murder. If a white man kills a nigger, that's justifiable homicide. If a nigger kills a nigger, that's one less nigger." C. Silberman, Criminal Violence, Criminal Justice 124 (1978).

upon a mere accusation of murder, rape, or other crimes of varying degrees of severity against white victims.[11]

The analogy to lynching is not mere rhetorical excess; Justice Stewart suggested, in essence, that the death penalty, imposed by government, was a substitute for lynching:

> In part, capital punishment is an expression of society's moral outrage in particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.
>
> > "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people believe that organized society is unwilling or unable to impose upon criminal defenders the punishment they 'deserve,' then there are sown the seeds of anarchy - of self-help, vigilante justice, and lynch law."

Gregg, supra, at 183, quoting Furman v. Georgia, supra, at 308 (Stewart, J., concurring). The Virginia Supreme Court justified the death penalty for attempted rape (it will be remembered that only blacks have been executed in Virginia for attempted rape) by using the same analysis:

> The likelihood of the resort to lynch law, unless there is a prompt conviction and a severe penalty imposed, and thus a resultant grave shock to the peace and dignity of the Commonwealth, is well known to exist, almost, if not quite equally, in the case of an attempted as of a consummated rape.

Hart v. Commonwealth, 131 Va. 726, 747, 109 S.E. 582 (1921).

In the normal criminal trial, in which the judge sets the sentence, the jury has no cause to address itself specifically to the issue of retribution. In Ristaino v. Ross, the jury was only making a finding of guilt; they were not imposing sentence. They were asked to apply the law to the facts; their job

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[11] Of 4,733 lynchings recorded in the United States between 1882 and 1968, 72.7% of the lynchings were of blacks. In Virginia, 83 of 100 lynching victims were black. R. Zangrando, The NAACP Crusade Against Lynching, 1909-1950 5 (1980). As Zangrando notes, the statistics do not include "legal lynchings" in which the trial was a sham and a mere prelude to the foregone conclusion of execution. See Powell v. Alabama, 287 U.S. 45 (1932).

did not call for expressing retribution or declaring social or penological policy.

The jury is called upon in capital trials to make two essentially unreviewable and subjective judgments. First, the jury is asked to determine whether the "vileness" criterion is met, a determination not susceptible of precision. Second, even if the jury decides that either the "vileness" or the "future dangerousness" criteria has been met, the jury must then decide whether to impose the death sentence. In Virginia, the jury is given no guidance as to how it should weigh aggravating circumstances, mitigating circumstances, and simple mercy.

This Court sanctioned the necessity of turning a jury loose in a case in which an aggravating circumstance has been found; this Court held in Zant v. Stephens, ___ U.S. ___, 77 L.Ed.2d 235 (1983), that unguided discretion by a jury in cases that reach the top layer of the conceptual pyramid implicates no constitutional rights. With the candid acknowledgement that courts can only control what cases reach the top layer, without reviewing the decision-making within that top layer, this Court has recognized that death penalty juries are ultimately unrestrained in their weighing of retribution and other emotional factors. It is this ultimate weighing that results in a large number of blacks being given the death sentence. The courts, at trial and on appeal, can review every decision but that ultimate decision; courts can reverse for prejudicial error at every step but the last.

It is precisely this inability to know after verdict whether the verdict was the product of prejudice that makes it so imperative that capital juries be screened before trial.[12] This Court has called for a "greater degree of reliability" in capital cases because the punishment of death is unique in its finality.

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[12] The jurors were asked whether they knew "of any reason whatsoever why they could not try the case fairly and impartially"; but this cannot reasonably be argued to have been sufficient to ferret out prejudice resulting from racial prejudice. Since at the time the questions were asked the jurors had no idea of the race of Jack Smith, the general question would obviously be ineffective to prod the jury into asking themselves whether the race of the victim and the race of the offender would affect their judgment.

Lockett v. Ohio, 438 U.S. 586, 604-605, 98 S.Ct. 2954, 57 L.Ed.2d 793 (1978). If the "greater degree of reliability" means anything, it means that easy steps that can be taken to eliminate racial prejudice should be taken, particularly where counsel was sufficiently concerned about the possibility to request the voir dire.[13]

III. APPELLANT WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, BECAUSE THE JURY WAS "DEATH-QUALIFIED," RESULTING IN A VENIRE BIASED IN FAVOR OF THE PROSECUTION.

The process of "death qualification" was sanctioned by the United States Supreme Court in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). However, Witherspoon did not purport to dispose of all objections to death qualification.

> The data adduced by the Petitioner, however, are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt. We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a per se constitutional rule requiring reversal of every conviction returned by a jury selected as this one was.

391 U.S. at 517-518; see also id. at n. 11.

Accordingly, the issue of "prosecution proneness" remains open. This issue has recently been litigated in Grigsby v. Mabry, ___ F.2d ____ (8th Cir. 1985) (en banc) aff'g. 569 F. Supp 1273 (E.D. Ark. 1983), where the Eighth Circuit held that death qualification does result in a jury panel that is biased in favor of the prosecution on the issue of guilt, as well as sentence.

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[13] This Court has recognized that counsel's contemporaneous assessment of the need for a particular kind of questioning is relevant to an evaluation of the adequacy of a voir dire. Wainwright v. Witt, ___ U.S. ___, 83 L.Ed.2d 841, 858 (1985).

The Fourth Circuit has concluded to the contrary. Turner v. Bass, 753 F.2d 342, 347 (1985), Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984). In Keeten, the Fourth Circuit had reversed the district court finding that death qualification results in a guilt-prone jury, and the reversal was accomplished with virtually no discussion of the voluminous facts found by the United States District Court for the Western District of North Carolina. When Petitioner was in the District Court, Petitioner asked that he be permitted to prove his claim by presenting the record from Keeten v. Garrison in the District Court, and supplementing it with similar studies correlating the data to the Virginia experience. The court denied all requests for an evidentiary hearing.

At this juncture, Petitioner is in the posture of riding on the back of Grigsby v. Mabry. If this Court grants certiorari to review the Eighth Circuit's en banc opinion in Grigsby v. Mabry (on the assumption that the state of Arkansas intends to file a Petition for Writ of Certiorari), then Petitioner would simply ask this Court to hold his Petition for consideration at the same time as consideration is given to the Petition in Grigsby v. Mabry. Th issue presented is the same, and the issue is surely going to be fully and adequately presented, with a full record, in that case.

Accordingly, Petitioner would ask that this Court simply hold his Petition pending disposition of the Petition that is sure to come from the State of Arkansas in Grigsby v. Mabry.

CONCLUSION

This case is coming to this Court at almost exactly the same time as two other major death penalty cases, both of which involve factual records that are important to Petitioner's claims. Both of the claims that Petitioner has asserted in this Petitioner have as their predicate the facts that make up the record in these other cases. The first such case is McCleskey v. Zant, 753 F.2d 877 (11th Cir. 1985) (en banc), decided January 29, 1985. In McCleskey, the death-sentenced inmates offered extensive statistical evidence to establish the disparate impact

of the death sentence, in the hope that the federal courts would rule Georgia's death penalty statutes unconstitutional.

As noted above, Petitioner is not here arguing that the Virginia death penalty statute's disparate impact is sufficient to rule out all possibilities other than racial discrimination, and therefore does not argue that the Virginia death penalty statute must be declared to be unconstitutional; rather, Petitioner seeks only to have the court recognize that race may, in "mid-level aggravation" cases, affect the decision to impose the death sentence. McCleskey, supra, at 887.[14] Such a racial influence should be a subject for voir dire. Turner, therefore, does not go as far as the petitioners in McCleskey v. Zant, though Turner relies on much the same data base.

The second case is Grigsby v. Mabry, ___ F.2d ___ (8th Cir. 1985) (en banc), decided January 31, 1985, presenting the death-qualification issue. If this Court is to review the Eighth Circuit's ruling in Grigsby v. Mabry, then this Court should consider the arguments and facts advanced on behalf of the death-sentence inmates in that case, and apply them in this case as well. Turner is very frankly riding on the back of the efforts of the habeas petitioners inmates in Grigsby v. Mabry, and therefore requests that his case not be decided adversely to him unless and until a disposition has been made of the Petition for Writ of Certiorari surely being filed by the state of Arkansas.

Petitioner Willie Lloyd Turner prays this Court to grant his Writ of Certiorari, and to reverse his conviction and death sentence.

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[14] According to the statistical studies done by Professors Baldus and Woodworth:

> [T]he results showed a 6% racial effect systemwide for white victim, black defendant cases with an increase to 20 % in the mid-range of cases.

McCleskey, supra, at 887.

WILLIE LLOYD TURNER

By counsel

J. Lloyd Snook, III
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CERTIFICATE

I J. Lloyd Snook, III, a member of the bar of this Court, do hereby certify that I sent one copy of this Petition for Writ of ~~Habeas Corpus~~ to this Court on April 24, 1985, and that I sent another copy of this Petition to Robert H. Anderson, III, Assistant Attorney General, 101 N. Eighth St., Richmond, Virginia 23219.

J. Lloyd Snook, III

Applied in Jenkins v. Commonwealth, 220 Va. 691, 255 S.E.2d 504 (1979).

§ 18.2-31. Capital murder defined; punishment. — The following offenses shall constitute capital murder, punishable as a Class 1 felony:

(a) The willful, deliberate and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit;

(b) The willful, deliberate and premeditated killing of any person by another for hire;

(c) The willful, deliberate and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof;

(d) The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon;

(e) The willful, deliberate and premeditated killing of a person during the commission of, or subsequent to, rape;

(f) The willful, deliberate and premeditated killing of a law-enforcement officer as defined in § 9-108.1 H when such killing is for the purpose of interfering with the performance of his official duties; and

(g) The willful, deliberate and premeditated killing of more than one person as a part of the same act or transaction.

If any one or more subsections, sentences or parts of this section shall be judged unconstitutional or invalid, such adjudication shall not affect, impair or invalidate the remaining provisions thereof but shall be confined in its operation to the specific provisions so held unconstitutional or invalid. (Code 1950, §§ 18.1-21, 53-291; 1960, c. 358; 1962, c. 42; 1966, c. 300; 1970, c. 648; 1973, c. 403; 1975, cc. 14, 15; 1976, c. 503; 1977, c. 478; 1979, c. 582; 1980, c. 221; 1981, c. 607; 1982, 636.)

The 1981 amendment added subdivision g and the last paragraph.

The 1982 amendment substituted "a prisoner confined in a state or local correctional facility as defined in § 53.1-1 for an inmate in a penal institution as defined in § 53-291.1" in subdivision c.

Law Review. — For survey of Virginia law on criminal law for the year 1974-1975, see 61 Va. L. Rev. 1607 (1975). For survey of Virginia criminal procedure for the year 1975-1976, see 62 Va. L. Rev. 1412 (1976). For comment, "Virginia's Capital Murder Statute: An Assessment," see 63 U. Richm. L. Rev. 101 (1978). For survey of Virginia criminal law for the year 1976-1977, see 63 Va. L. Rev. 1399 (1977). For article, "Psychiatry and the Death Penalty: Evolving Problems in Virginia," see 66 Va. L. Rev. 167 (1980). For comment discussing possible effects on Virginia death penalty statute of recent United States Supreme Court decisions, see 67 U. Richm. L. Rev. 951 (1983).

Constitutionality. — [illegible] murder statutes are not unconstitutionally vague. Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 784, 100 S. Ct. 1331, 444 U.S. 1013, 62 L. Ed. 2d 741, 421 S. Ed. 2d 736 (1980).

The word "purpose" in subsection f of this section equates with intent, rather than motive. Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980).

In [illegible] this section [illegible] purpose [illegible] any prosecution thereunder, the death penalty may be imposed only where the Commonwealth proves beyond a reasonable doubt that the killing of a law enforcement officer was committed for the purpose of interfering with the performance of his official duties and not for any other motive. Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980).

The purpose of underlying language of subsection f of this section does not change the requirement that the motive is not an essential element of murder although proof of motive may be [illegible] intent in cases of circumstantial evidence. Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980).

The Commonwealth must prove that the accused was a convict at the time of the homicide in order to convict him of the murder [illegible] under this section. Brown v. Commonwealth, 132 Va. 696, 111 S.E. 312 (1922).

This section does not require proof that a defendant charged with murder during the commission of a robbery or a rape was a principal in the first degree to the crimes of

Whether to allow jury to separate is matter within trial judge's discretion. McFalls v. Peyton, 270 F. Supp. 577 (W.D. Va. 1967), cert. denied, 394 U.S. 951, 89 S. Ct. 1292, 22 L. Ed. 2d 486 (1969).

As to the exercise of the judge's discretion as to whether the jury should separate, it is to be remembered that the statutes or decisions of many states expressly allow the separation of the jury even in capital cases. Other states have provided the contrary. The practice has varied, with perhaps a slight present tendency in the more conservative direction. If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day. Rich v. United States, 330 F. Supp. 949 (E.D. Va. 1967), appeal dismissed, 447 F.2d 990 (4th Cir. 1968), cert. denied, 394 U.S. 993, 89 S. Ct. 1473, 22 L. Ed. 2d 769, rehearing denied, 395 U.S. 931, 89 S. Ct. 1777, 23 L. Ed. 2d 252 (1969).

Exercise of trial judge's discretion in absence of accused. — While it is true that whether to allow the jury to separate is a matter within the trial judge's discretion, it is not to be presumed that the discretion is to be exercised in a vacuum, in other words, in the absence of the accused in contravention of § 19.2-259. Near v. Cunningham, 313 F.2d 929, commented on in 21 Wash. & Lee L. Rev. 346 (1964).

Abuse of discretion. — In capital cases, where objection is interposed to the jury being permitted to separate after deliberations have been commenced, it may be an abuse of discretion, especially where no admonitions were given or where the inconvenience to the jurors is likely to touch upon their ability to give proper consideration to the case when they resume their deliberations. Rich v. United States, 330 F. Supp. 949 (E.D. Va. 1967), appeal dismissed, 447 F.2d 990 (4th Cir. 1968), cert. denied, 394 U.S. 993, 89 S. Ct. 1473, 22 L. Ed. 2d 769, rehearing denied, 395 U.S. 931, 89 S. Ct. 1777, 23 L. Ed. 2d 252 (1969).

Separation with consent of accused and Commonwealth. — Where the jury has been permitted to separate by the court upon the consent of the accused and the Commonwealth, prejudice will not be presumed in favor of the accused, and the burden will be upon him to show that the jury, during such separation, were guilty of misconduct to his prejudice. Powell v. Commonwealth, 182 Va. 327, 28 S.E.2d 687 (1944); Near v. Commonwealth, 202 Va. 20, 116 S.E.2d 85 (1960), cert. denied, 365 U.S. 872, 81 S. Ct. 907, 5 L. Ed. 2d 862 (1961), 369 U.S. 862, 82 S. Ct. 951, 8 L. Ed. 2d 19 (1962).

If prejudice is shown, it is grounds for a new trial in any case where the jury is permitted to separate and the jurors have been subjected to outside influence. This is equally true both for a criminal case and with respect to a civil case involving a de minimis amount. Rich v. United States, 330 F. Supp. 949 (E.D. Va. 1967), appeal dismissed, 447 F.2d 990 (4th Cir. 1968), cert. denied, 394 U.S. 993, 89 S. Ct. 1473, 22 L. Ed. 2d 769, rehearing denied, 395 U.S. 931, 89 S. Ct. 1777, 23 L. Ed. 2d 2521 (1969).

Separation of jury as grounds for habeas corpus. — In a petition for habeas corpus, accused was entitled to a hearing where it was alleged that, in the absence of the accused, the trial judge had exercised his discretion to allow the jury to separate during the trial and that thereafter the jurors mingled with the spectators and heard prejudicial remarks. Near v. Cunningham, 313 F.2d 929 (1963), commented on in 21 Wash. & Lee L. Rev. 346 (1964).

§ 19.2-264.1. Views by juries. — The jury in any criminal case may, at the request of either the attorney for the Commonwealth or any defendant, be taken to view the premises or place in question, or any property, matter or thing relating to the case, when it shall appear to the court that such view is necessary to a just decision. (Code 1950, § 8-216; 1977, c. 624.)

ARTICLE 4.1.

Trial of Capital Cases.

§ 19.2-264.2. Conditions for imposition of death sentence. — In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which

he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed. (1977, c. 492.)

Cross references. — As to review of death sentences by supreme court, see § 17-110.1. As to the priority given to review of death sentences, see § 17-110.2.

The numbers of §§ 19.2-264.2 through 19.2-264.5 were assigned by the Virginia Code Commission, the numbers in the 1977 act having been 19.2-264.1 through 19.2-264.4.

Law Review. — For survey of Virginia criminal procedure for the year 1976-1977, see 63 Va. L. Rev. 1408 (1977). For article "Psychiatry and the Death Penalty: Emerging Problems in Virginia," see 66 Va. L. Rev. 167 (1980). For survey of Virginia law on criminal procedure for the year 1978-1979, see 66 Va. L. Rev. 261 (1980). For a comment discussing possible effects on Virginia's death penalty law in the light of recent United States Supreme Court decisions, see 15 U. Rich. L. Rev. 951 (1981).

Constitutionality of article. — This article is not facially unconstitutional under the Eighth and Fourteenth Amendments. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979); Evans v. Commonwealth, 222 Va. 766, 284 S.E.2d 816 (1981), cert. denied, — U.S. —, 102 S. Ct. 1741, 72 L. Ed. 2d 155 (1982); Stamper v. Baskerville, 531 F. Supp. 1122 (E.D. Va. 1982).

Virginia's capital murder statutes are not unconstitutional. Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), cert. denied, 444 U.S. 1049, 100 S. Ct. 741, 62 L. Ed. 2d 736 (1980).

The death penalty under Virginia capital murder statute does not constitute cruel and unusual punishment nor deny a defendant due process or equal protection. Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979), cert. denied, 445 U.S. 972, 100 S. Ct. 1666, 64 L. Ed. 2d 249 (1980).

The statutory definitions of the two aggravating circumstances are not so vague as to vest the sentencing authority with standardless sentencing power. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979); Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980).

The fact that the statutory alternative to the capital penalty is one which permits parole does not mean that the sentencing authority is constitutionally overbroad. Mercy by parole is not unconstitutional. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979).

This section is not unconstitutionally vague. Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980).

The second clause of this section provides specific criteria which must be met before the death penalty can be imposed on the basis of this clause. The conduct in committing the offense must be deemed to be outrageously or wantonly vile, horrible or inhuman, and second, the jury must conclude that the conduct establishes one of the following: torture of the victim, an aggravated battery of the victim, or the perpetrator's depravity of mind. Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), cert. denied, 451 U.S. 1041, 101 S. Ct. 2347, 68 L. Ed. 2d 863 (1981).

Former statutes not presumptively unconstitutional. — The former death penalty statutes, enacted in 1975, were not rendered presumptively unconstitutional by decisions of the United States Supreme Court invalidating the death penalty statutes of other states. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979).

Retroactive application not unconstitutional. — The application of the 1977 death penalty law to a defendant who committed his crime while the 1975 death penalty law was in effect was not a violation of the ex post facto clauses of the State and federal Constitutions, since the 1975 law was presumptively valid, in spite of decisions of the United States Supreme Court invalidating the death penalty statutes of other states, and since the changes incorporated in the 1977 law are both ameliorative and procedural. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979).

The words "depravity of mind" as used in this article mean a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979); Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980).

The words "aggravated battery" as used in this article mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979); Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980); Whitley v. Common-

v. Commonwealth, 220 Va. 971, 266 S.E.2d 87 (1980), cert. denied, — U.S. —, 102 S. Ct. 1491, 71 L. Ed. 2d 693 (1982).

The court properly refused an instruction offered by the defendant which would have told the jury that if it could not reach agreement as to the appropriate punishment, the court would dismiss it and impose a life sentence. Justus v. Commonwealth, 220 Va. 971, 266 S.E.2d 87 (1980), cert. denied, — U.S. —, 102 S. Ct. 1491, 71 L. Ed. 2d 693 (1982).

Commonwealth could rebut defendant's closing argument. — Since in the sentencing stage of a capital murder trial, the prosecution has the burden of proving aggravating circumstances beyond a reasonable doubt, it was not improper to permit the Commonwealth's attorney to rebut the defendant's closing argument in the sentencing stage of the trial. Wave v. Commonwealth, 219 Va. 680, 251 S.E.2d 202, cert. denied, 442 U.S. 924, 99 S. Ct. 2850, 61 L. Ed. 2d 292 (1979).

Applied in Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979); Clanton v. Commonwealth, 222 Va. 41, 286 S.E.2d 172 (1982); Fitzgerald v. Commonwealth, 223 Va. 615, 292 S.E.2d 798 (1982).

§ 19.2-264.3. Procedure for trial by jury. — A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence of the defendant of the offense charged in the indictment, or any other offense supported by the evidence for which a lesser punishment is provided by law and the penalties therefor.

B. If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed, it shall fix the punishment for such offense as provided by law.

C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty, which shall be fixed as is provided in § 19.2-264.4.

If the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty. (1977, c. 492; 1983, c. 519.)

The 1983 amendment, effective March 28, 1983, added the undesignated paragraph following subsection C.

Law Review. — For survey of Virginia criminal procedure for the year 1976-1977, see 63 Va. L. Rev. 1408 (1977). For article, "Psychiatry and the Death Penalty: Emerging Problems in Virginia," see 66 Va. L. Rev. 167 (1980). For a comment discussing possible effects on Virginia's death penalty law in the light of recent United States Supreme Court decisions, see 15 U. Rich. L. Rev. 951 (1981).

Constitutionality. — See note under § 19.2-264.2.

Failure to question jury as to bias in favor of death penalty. — In a prosecution for robbery and capital murder, the refusal by the trial judge to ask the jury whether, if the jury should happen to convict the defendant of capital murder, each juror would be able to consider voting for a sentence less than death, or to ask an equivalent question, was prejudicial error invalidating the sentence to death. Patterson v. Commonwealth, 222 Va. 653, 283 S.E.2d 212 (1981).

Instruction held erroneous. — Harmful, reversible error occurred in a capital murder prosecution when the trial court instructed the jury in such a manner that the jury could have believed that it could convict the defendant of capital murder though it was unable to determine who fired the fatal shots or if it determined that the defendant's brother fired the fatal shots; the error was compounded when the Commonwealth was permitted to argue to the jury that it could convict the defendant regardless of who pulled the trigger. Johnson v. Commonwealth, 220 Va. 146, 255 S.E.2d 525 (1979), cert. denied, 454 U.S. 920, 102 S. Ct. 422, 70 L. Ed. 2d 231 (1981).

Applied in Wave v. Commonwealth, 219 Va. 680, 251 S.E.2d 202 (1979); Justus v. Commonwealth, 220 Va. 971, 266 S.E.2d 87 (1980); Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980); Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980); Ball v. Commonwealth, 221 Va. 754, 273 S.E.2d 790 (1981); Quintana v. Commonwealth, — Va. —, 295 S.E.2d 643 (1982).

§ 19.2-264.4. Sentence proceeding. A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (v) the age of the defendant at the time of the commission of the capital offense.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed ..... foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed ..... foreman"

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life. (1977, c. 492; 1980, c. 160.)

Law Review. — For survey of Virginia criminal procedure for the year 1976-1977, see 63 Va. L. Rev. 1408 (1977). For article, "Psychiatry and the Death Penalty: Emerging Problems in Virginia," see 66 Va. L. Rev. 167 (1980). For survey of Virginia law on criminal procedure for the year 1978-1979, see 66 Va. L. Rev. 261 (1980). For article, "The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation," see 66 Va. L. Rev. 427 (1980). For a comment discussing possible effects on Virginia's death penalty law in the light of recent United States Supreme Court decisions, see 15 U. Rich. L. Rev. 951 (1981).

(U.S. 1101, 100 S. Ct. 1069, 62 L. Ed. 2d 788 (1980).

The effect of a defendant's incarceration upon relatives is not a mitigating circumstance for the jury to consider. Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979), cert. denied, 444 U.S. 1101, 100 S. Ct. 1069, 62 L. Ed. 2d 788 (1980).

Instruction failing to advise death penalty not mandatory. — In the penalty trial phase of a prosecution for capital murder following rape, an instruction which failed explicitly to advise the jury that, even though it might find aggravating circumstances, the death penalty is not mandatory, while not artfully drawn, was not error, since, read as a whole, the instruction fairly expounded the thrust of the statute. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979).

Elimination for bias in favor of death penalty permitted. — The process of selection of an impartial jury permits elimination for cause of those veniremen who are biased in favor of the death penalty under all circumstances as well as those who are biased against its imposition under all circumstances. Patterson v. Commonwealth, 222 Va. 653, 283 S.E.2d 212 (1981).

And refusal to question jury as to bias invalidates sentence. — In a prosecution for robbery and capital murder, the refusal by the trial judge to ask the jury whether, if the jury should happen to convict the defendant of capital murder, each juror would be able to consider voting for a sentence less than death, or to ask an equivalent question, was prejudicial error invalidating the sentence to death. Patterson v. Commonwealth, 222 Va. 653, 283 S.E.2d 212 (1981).

Applied in Mason v. Commonwealth, 219 Va. 1091, 254 S.E.2d 116 (1979); Johnson v. Commonwealth, 220 Va. 146, 255 S.E.2d 525 (1979); Guarratano v. Commonwealth, 220 Va. 1064, 266 S.E.2d 94 (1980); Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980); Briley v. Commonwealth, 221 Va. 532, 273 S.E.2d 48 (1980); Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980); Ball v. Commonwealth, 221 Va. 754, 273 S.E.2d 790 (1981); Fitzgerald v. Commonwealth, 223 Va. 615, 292 S.E.2d 798 (1982); Quintana v. Commonwealth, — Va. —, 295 S.E.2d 643 (1982); Stamper v. Baskerville, 531 F. Supp. 1122 (E.D. Va. 1982).

§ 19.2-264.5. Post sentence reports. — When the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate upon the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as provided in § 19.2-299. After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life. (1977, c. 492.)

Law Review. — For survey of Virginia criminal procedure for the year 1976-1977, see 63 Va. L. Rev. 1408 (1977). For article, "Psychiatry and the Death Penalty: Emerging Problems in Virginia," see 66 Va. L. Rev. 167 (1980).

Constitutionality. — See note under § 19.2-264.2.

Virginia's capital sentencing procedure statutes are not facially invalid on grounds that the death penalty is cruel and unusual punishment under the Eighth and Fourteenth Amendments. Mason v. Commonwealth, 219 Va. 1091, 254 S.E.2d 116, cert. denied, 444 U.S. 919, 100 S. Ct. 239, 62 L. Ed. 2d 176 (1979).

This section does not unconstitutionally discriminate against a capital defendant because its "good cause" provision imposes upon him a heavier burden in reducing a capital verdict than in reducing a noncapital verdict. Bassett v. Commonwealth, 222 Va. 844, 284 S.E.2d 844 (1981), cert. denied, — U.S. —, 102 S. Ct. 1996, 72 L. Ed. 2d 458 (1982).

The phrase "upon good cause shown" contained in this section merely reiterates the rule applicable in all cases, misdemeanor, felony, or capital, when the court must consider altering a jury verdict. The same criterion applies in capital as well as noncapital cases. Bassett v. Commonwealth, 222 Va. 844, 284 S.E.2d 844 (1981), cert. denied, — U.S. —, 102 S. Ct. 1996, 72 L. Ed. 2d 458 (1982).

Failure to interview parents or wife. — The defendant was not denied any statutory rights in the sentencing phase of his capital murder trial as the result of the probation officer's failure to interview the defendant's parents or wife. Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979), cert. denied, 445 U.S. 972, 100 S. Ct. 1666, 64 L. Ed. 2d 249 (1980).

A probation report which used information from a prior presentence report was not erroneously admitted at the sentencing phase of a capital murder trial where the proba-

Willie Lloyd TURNER

v.

COMMONWEALTH of Virginia.

Record No. 800375.

Supreme Court of Virginia.

Nov. 26, 1980.

The Circuit Court, Southampton County, James C. Godwin, J., convicted defendant of capital murder, possession of sawed-off shotgun, the commission of a crime of violence, and use of a firearm in the commission of a felony, and defendant appealed. The Supreme Court, l'Anson, C. J., held that: (1) trial court's refusal to question jurors individually out of presence of other prospective jurors and refusal to allow counsel-conducted voir dire was not an abuse of discretion; (2) trial court did not err in refusing to ask several questions proposed by defense counsel; (3) trial court did not err in questioning prospective jurors concerning their willingness to impose capital punishment and in striking prospective juror from venire; (4) trial court did not abuse its discretion in failing to sequester jury; (5) death penalty provisions were facially constitutional; (6) imposition of death penalty on basis of jury's conclusion regarding propensity for future crime was constitutional; (7) evidence was sufficient to support conclusion that defendant's conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery; (8) double jeopardy did not preclude conviction of use of firearm in the commission of a felony as well as murder in the commission of a robbery while armed with a deadly weapon; and (9) death penalty was properly imposed.

Affirmed.

1. Jury ⇐131(1)

Statute governing voir dire does not confer upon attorneys the unconditional right to question prospective jurors directly and thus does not conflict with rule which makes exercise of that right contingent upon trial court's approval. Code 1950, § 8.01-358; Supreme Court Rules, Rule 3A:20(a); Const. Art. 6, § 5.

2. Jury ⇐131(1)

While defendant has constitutional right to a fair and impartial jury, he has no constitutional right to counsel-conducted voir dire; in the absence of a statute or court rule to the contrary, as long as the selection procedure results in a fair and impartial jury, manner in which jury is to be selected is properly within trial court's sound discretion. Code 1950, § 8.01-358; Supreme Court Rules, Rule 3A:20(a); Const. Art. 6, § 5.

3. Jury ⇐131(13)

Trial court's refusal to question jurors individually out of the presence of other prospective jurors and the court's refusal to allow counsel-conducted voir dire did not represent abuse of discretion. Code 1950, § 8.01-358; Supreme Court Rules, Rule 3A:20(a); Const. Art. 6, § 5.

4. Jury ⇐131(2)

Unless refusal to ask question of prospective jurors amounts to denial of due process or otherwise impinges upon right to fair and impartial jury, trial court may use its discretion in determining whether to ask questions proposed by either Commonwealth or defendant. Code 1950, § 8.01-358; Supreme Court Rules, Rule 3A:20(a); Const. Art. 6, § 5.

5. Jury ⇐131(6)

Trial court's refusal to ask prospective jurors certain questions proposed by defense counsel concerning possible racial prejudice did not impinge upon defendant's right to a fair and impartial jury, even though defendant was black and victim was white. Code 1950, § 8.01-358; Supreme Court Rules, Rule 3A:20(a); Const. Art. 6, § 5.

6. Jury ⇐131(6)

While wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by de-

fendant, trial court's refusal to do so is not constitutionally objectionable in the absence of factors similar to those in United States Supreme Court's *Ham* decision; mere fact that defendant is black and victim is white does not constitutionally mandate such an inquiry. Code 1950, § 8.01-358; Supreme Court Rules, Rule 3A:20(a); U.S.C.A.Const. Amends. 5, 14.

7. Jury ⇐131(8)

Refusal of trial court to ask questions concerning circumstances under which prospective juror would vote for death penalty was not constitutionally objectionable, where voir dire questioning conducted by trial judge probed many of the areas touched upon by proposed questions and assured removal of those who would invariably impose capital punishment and where trial court's instructions to jury clearly delineated circumstances in which death penalty could be imposed.

8. Jury ⇐131(8)

Trial court did not err in questioning prospective jurors concerning their willingness to impose capital punishment.

9. Jury ⇐108

Trial court did not abuse its discretion in concluding that prospective juror's objections to capital punishment were absolute and that he should therefore be struck from venire.

10. Jury ⇐108

While jurors may not be excluded simply because they voice general objections to death penalty or express conscientious or religious scruples against its infliction, those jurors irrevocably committed to voting against death penalty may be excluded.

11. Criminal Law ⇐1158(3)

Trial court's determination that juror is irrevocably committed to voting against death penalty will not be disturbed on appeal unless court can say prospective juror's commitment against death penalty was not unmistakably clear.

12. Criminal Law ⇐854(2)

In the absence of any indication of pretrial prejudicial publicity, trial judge has wide discretion in deciding whether to sequester a jury.

13. Criminal Law ⇐854(1)

Mere fact of media coverage does not require judge to sequester a jury.

14. Criminal Law ⇐854(2)

Trial judge's discretion regarding sequestration extends to cases involving capital punishment.

15. Criminal Law ⇐1206(1)

Statutory provisions concerning death penalty are not facially unconstitutional. U.S.C.A.Const. Amend. 8; Code 1950, § 19.2-264.2.

16. Criminal Law ⇐1208(1)

A defendant's propensity for future criminal acts of violence is an acceptable consideration in determining whether to impose death penalty. Code 1950, § 19.2-264.2.

17. Homicide ⇐354

In prosecution for capital murder, evidence was sufficient to support conclusion that defendant's conduct in committing the offenses was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery. Code 1950, § 19.2-264.2.

18. Homicide ⇐354

In prosecution for capital murder, even if defendant's crime did not meet "vileness" standard of capital punishment statute, imposition of death penalty would have been permissible under "dangerousness" standard, as jury could have reasonably concluded that defendant would probably "commit criminal acts of violence that would constitute a continuing serious threat to society," in view of defendant's prior criminal record. Code 1950, § 19.2-264.2.

19. Criminal Law ⇐1177

Trial judge's refusal to ask jury members, either individually or collectively, whether their sentencing verdict was grounded upon "dangerousness" or "vileness" standard or both was not prejudicial error, although it would have accorded with

better practice if trial judge had determined with certainty basis for jury's sentence. Code 1950, § 19.2-264.2.

20. Homicide ⇐235

In prosecution for capital murder, evidence of asportation was sufficient to establish commission of robbery, even though defendant never had physical possession of jewelry bags personally, in view of evidence that defendant at gun-point commanded others to place money and valuables into jewelry bags owned by store. Code 1950, §§ 18.2-31(d), 18.2-32, 19.2-264.2.

21. Criminal Law ⇐161

Constitutional prohibition of double jeopardy consists of three separate guarantees: it protects against second prosecution for same offense after acquittal, it protects against second prosecution for same offense after conviction, and it protects against multiple punishments for the same offense. U.S.C.A.Const. Amend. 5.

22. Criminal Law ⇐1209

Constitutional guarantee against multiple punishments is limited to assuring that court does not exceed its legislative authorization by imposing multiple punishments for the same offense. U.S.C.A.Const. Amend. 5.

23. Criminal Law ⇐1209

Where two or more punishments for separate statutory violations are imposed in a single criminal proceeding, question of what punishments are constitutionally permissible is not different from question of what punishments legislative branch intended to impose. U.S.C.A.Const. Amend. 5.

24. Criminal Law ⇐200(1)

Double jeopardy clause of the United States Constitution did not preclude conviction of use of a firearm in the commission of a felony as well as murder in the commission of a robbery while armed with a deadly weapon. Code 1950, §§ 18.2-31(d), 18.2-53.1; 18 U.S.C.A. § 921.

25. Homicide ⇐354

Death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Code 1950, § 17-110.1, subd. C, par. 1.

26. Criminal Law ⇐1206(2)

In capital murder case, imposition of death sentence was not excessive or disproportionate to penalty imposed in similar cases. Code 1950, § 17-110.1, subd. C, par. 2.

27. Criminal Law ⇐122

Trial court did not abuse its discretion in denying defendant's motion for change in venue from county to which case had been transferred pursuant to previous change of venue, even though second motion for change of venue was not made until defense counsel learned of another case in the county involving death penalty and another murder in the area.

28. Criminal Law ⇐438(4, 5)

In capital murder prosecution, trial court did not err in admitting photographs of victim and crime scene.

29. Homicide ⇐311

In capital murder prosecution, trial court did not err in failing to give jury instruction concerning possibility of parole.

John C. Lowe, Charlottesville (J. Lloyd Snook, III; Thomas L. Woodward, Jr.; William R. Savage, III, Suffolk, Va., Lowe & Gordon, Charlottesville, Ltd., on briefs), for appellant.

Robert H. Anderson, III, Asst. Atty. Gen. (Marshall Coleman, Atty. Gen., on brief), for appellee.

Before I'ANSON, C. J., and CARRICO, HARRISON, COCHRAN, POFF, COMPTON and THOMPSON, JJ.

LAWRENCE W. I'ANSON, Chief Justice.

The defendant, Willie Lloyd Turner, was convicted of capital murder, Code § 18.2-

31(d)[1]; possession of a sawed-off shotgun in the commission of a crime of violence (robbery), Code § 18.2-308(A); and the use of a firearm (a pistol) in the commission of a felony (murder), Code § 18.2-53.1. The jury fixed Turner's punishment at one year in the penitentiary for violating Code § 18.2-53.1 and life imprisonment for violating Code § 18.2-308(A). In the second stage of the bifurcated proceeding conducted pursuant to Code §§ 19.2-264.3 and -264.4, the jury fixed the defendant's punishment for capital murder at death. At the conclusion of a separate sentencing hearing conducted pursuant to Code § 19.2-264.5, the trial court sentenced the defendant to death for capital murder and sentenced him in accordance with the jury's verdicts on the other two offenses. The defendant is here for an automatic review of the death sentence, consolidated with his appeal from his several convictions. Code § 17-110.1.

I. FACTS

On July 12, 1978, at approximately 11:30 a. m., Willie Lloyd Turner, a black male, entered a jewelry store owned and operated by W. Jack Smith, Jr., a white male. In addition to Smith, an employee (Mary Huffman) and a customer were present when Turner entered the store. After entering the store, Turner displayed a sawed-off shotgun previously concealed by a towel and demanded money and jewelry. Smith, while placing money and jewelry into the store's jewelry bags, triggered a silent alarm alerting the police department.

Judith R. Cosby and Police Officer Alan D. Bain, having entered the store without knowing a robbery was in progress, were detained in the store by Turner. Having discovered Smith had triggered a silent alarm, Turner demanded that Smith turn off the alarm. After acceding to Turner's demand, Smith, along with Cosby, began placing additional valuables designated by Turner into jewelry bags.

Near the rear of the store, Turner examined a revolver taken from Bain and fired a bullet toward the rear wall. Turner stated if he saw or heard any additional police officers, he was going to start killing those in the store. About that time, Bain heard a siren. Turner then walked from the back of the store toward the middle of the store, where Smith was stationed behind a counter, and fired a bullet from the revolver at Smith without warning. Smith, with blood on his temple, slumped behind the counter. Bain began talking with Turner, promising him to take him anywhere he wanted to go and asking him not to shoot again. While Bain talked with Turner, two occupants scrambled out the front door. After Turner told Bain he was going to kill Smith because he had triggered the silent alarm, Turner leaned over the counter and fired two bullets from the revolver into Smith's chest in rapid succession. Bain then grabbed and subdued Turner while Cosby ran out the front door. Smith died as a result of the bullets fired by Turner into Smith's chest.

II. JURY SELECTION AND SEQUESTRATION

Several of the defendant's assignments of error concern the manner in which voir dire was conducted. Over defense counsel's objections, the trial judge ruled that he alone would ask the questions of prospective jurors during voir dire. He also concluded that he would question jurors in groups of five, except when questioning jurors concerning their views on the death penalty. Although questioning concerning the death penalty occurred at least initially in groups of five, each prospective juror was required to answer individually at least two questions concerning capital punishment.[2] Prior

1. Code § 18.2-31(d) provides that "[t]he willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon" constitutes a capital murder.

2. Jurors were asked variations of the following questions: "Do you have any religious or conscientious scruples or objections against the imposition of the death sentence?" and "Do you feel that in each and every case, regardless of the facts, where a person is convicted of

to the day of trial, the court asked counsel for the Commonwealth and the defendant to submit questions they wished to have asked. Turner's counsel submitted a list of fifteen questions, nine of which were asked by the trial judge.

A. REFUSAL TO ALLOW COUNSEL-CONDUCTED VOIR DIRE

[1] The defendant contends that Code § 8.01-358 [3] gives both court and counsel an unconditional right to question prospective jurors directly and that the trial court abridged this statutorily created right by refusing to allow counsel-conducted voir dire. Citing Supreme Court Rule 3A:20(a),[4] the Commonwealth replies that the trial courts have discretion in determining whether to permit counsel-conducted voir dire.

The Constitution of Virginia, Art. VI, § 5, prohibits the promulgation of any court rule "in conflict with the general law as the same shall, from time to time, be established by the General Assembly." Supreme Court Rule 3A:20(a) clearly makes the right to counsel-conducted voir dire contingent upon the trial court's approval. In resolving the issue before us, we must determine whether Code § 8.01-358 confers upon attorneys the unconditional right to question prospective jurors directly. If Code § 8.01-358 confers such a right, it prevails over that portion of Rule 3A:20(a) which makes the exercise of that right contingent upon the trial court's approval.

The legislative history of § 8.01-358 is useful in discerning whether the General Assembly intended to confer such a right upon attorneys. The Code of 1887 § 3154 required trial courts to question prospective jurors when requested to do so by the litigants.[5] The Code of 1919 § 6000 enlarged a trial court's powers by providing that a court could question jurors even though not requested to do so by counsel.[6] The pertinent language remained unchanged for several decades. *See* Code of 1950 § 8-199 (1950). In 1966, the General Assembly amended Code § 8-199 to read as follows:

> "The court *and counsel for either party* may examine on oath any person who is called as a juror therein *and may ask such person or juror directly any relevant question* to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case."

murder he should receive the death penalty?" Those jurors answering no to both questions were deemed suitable, without further questioning, with respect to their attitude toward the death penalty. Those answering yes to either question were questioned further by the court.

3. Code § 8.01-358 provides: "The court and counsel for either party may examine under oath any person who is called as a juror therein and may ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case."

"A juror, knowing anything relative to a fact in issue, shall disclose the same in open court."

4. Supreme Court Rule 3A:20(a) provides that following mandatory questioning by the court as to seven potential grounds for juror exclusion, "the court, or counsel with permission of the court, may examine on oath any prospective juror or may ask any question relevant to his qualifications as an impartial juror."

5. Code of 1887 § 3154 provided, insofar as is pertinent, that "[t]he court shall, on motion of either party in any suit, examine on oath any person who is called as a juror therein, to ascertain" the juror's qualifications.

6. Code of 1919 § 6000 provided, insofar as is pertinent, that "[t]he court shall, on motion of either party in any suit, or may of its own accord," examine any prospective juror.

Acts 1966, c. 496, at 676 (language added in 1966 italicized). On June 15, 1971, this court promulgated a comprehensive set of rules governing criminal practice and procedure, to be effective January 1, 1972. One of these rules was Rule 3A:20, which unambiguously gives the trial court discretion in determining whether to allow counsel-conducted voir dire. 211 Va. cvi (1971). Code § 8-199 was recodified as Code § 8-208.28 in 1973 without any change. Acts 1973, c. 439, at 651-52. In another recodification, the texts of Code §§ 8-215 (1957 Repl.Vol.)[7] and 8-208.28 were combined to form the present text of Code § 8.01-358. Acts 1977, c. 617, at 1111.

As both parties recognize, we have not previously resolved whether the 1966 amendment to this statute confers upon attorneys an unconditional right to participate directly in voir dire. In *Harmon v. Commonwealth*, 209 Va. 574, 166 S.E.2d 232 (1969), we held that when a litigant's attorney has agreed that the judge alone would ask the voir dire questions, he or she cannot require the trial judge to exercise that right in a particular fashion. In upholding Harmon's conviction, we concluded that the statutory *permission* for the court to ask such questions directly does not *require* a court to do so. Thus, the trial court was permitted, but not required as contended by Harmon, to question jurors individually. In regard to voir dire conducted by counsel, we noted that the propounding of questions by the trial judge, and not by counsel for the defendant, was "in accordance with the usual practice." 209 Va. at 579, 166 S.E.2d at 236. We also concluded that the word "may" "is not mandatory but permissive and leaves the matter to the discretion of the trial court." 209 Va. at 580, 166 S.E.2d at 236.

Prior to the 1966 amendment, the litigants' counsel had no authority whatsoever for directly participating in voir dire examinations. "Although the statute formerly required the judge alone to ask the questions, in practice most trial courts *permitted* counsel to ask them directly." Boyd, *Practice and Pleading: The Twelfth Annual Survey of Virginia Law: 1966-1967*, 53 Va.L.Rev. 1763, 1781 (1967) (emphasis added). The 1966 amendment "sanction[ed] this deviation and [brought] Virginia in line with the procedure in other jurisdictions." *Id.* Thus, the amendment authorized what was already in fact occurring: counsel's participation in voir dire when permitted by the trial court.

Cognizant that the statutory language might be subject to different interpretations, this court in 1971 promulgated Rule 3A:20(a) of the Rules of Criminal Practice and Procedure. This Rule, which clearly makes counsel's participation in voir dire contingent upon the trial court's approval, resolved any ambiguity present in the statutory language.

[2, 3] Turner suggests that, even if Code § 8.01-358 confers no unconditional right to counsel-conducted voir dire, the trial court abused its discretion in refusing to allow defense counsel to question prospective jurors directly and in not questioning each prospective juror out of the presence of other jurors. While the defendant has a constitutional right to a fair and impartial jury, he has no constitutional right to counsel-conducted voir dire. *See, e. g., United States v. Duke*, 409 F.2d 669, 671 (4th Cir. 1969), *cert. denied*, 397 U.S. 1062, 90 S.Ct. 1497, 25 L.Ed.2d 683 (1970). In the absence of a statute or court rule to the contrary, as long as the selection procedure results in a fair and impartial jury, the manner in which a jury is to be selected is properly within the trial court's sound discretion. Thus, the trial court's refusal to question jurors individually out of the presence of other prospective jurors and the court's refusal to allow counsel-conducted voir dire do not represent an abuse of discretion. *See Dean v. Commonwealth*, 209 Va. 666, 669, 166 S.E.2d 228, 230 (1969). We have carefully examined the voir dire conducted

7. Code § 8-215 (1957 Repl.Vol.) provided: "A juror, knowing anything relative to a fact in issue, shall disclose the same in open court."

by the trial judge and believe it resulted in a fair and impartial jury. Under such circumstances, we cannot say the trial judge abused his discretion.

B. REFUSAL TO ASK SPECIFIC QUESTIONS PROPOSED BY DEFENSE COUNSEL

[4] As noted previously, the trial court refused to ask several questions proposed by defense counsel.[8] Turner contends that the failure to ask these questions constituted prejudicial error.

The pre-1966 text of what is now Code § 8.01-358 provided that "[t]he court shall, on motion of either party in any suit, examine" jurors to ascertain their qualifications concerning impartiality and lack of bias. The 1966 amendment deleted this requirement, providing merely that "the court . . . may examine [a prospective juror] and may ask [such juror] any relevant question." In *Harmon v. Commonwealth*, 209 Va. at 580, 166 S.E.2d at 236, we held that this statutory language "is not mandatory but permissive and leaves the matter to the discretion of the trial court." With the exception of seven questions, all of which were asked in this case, Rule 3A:20(a) makes voir dire questioning entirely discretionary with the trial court. Unless the refusal to ask a question amounts to a denial of due process or otherwise impinges upon the right to a fair and impartial jury, *see, e. g., Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973), the present wording of Code § 8.01-358 and Rule 3A:20(a) empowers a trial court to use its discretion in determining whether to ask questions proposed by either the Commonwealth or the defendant.

[5-7] The trial court's refusal to ask the questions proposed by defense counsel did not impinge upon the defendant's right to a fair and impartial jury. While "the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant," a trial court's refusal to do so is not constitutionally objectionable in the absence of factors similar to those in *Ham*.[9] *Ristaino v. Ross*, 424 U.S. 589, 597 n.9, 96 S.Ct. 1017, 1022 n.9, 47 L.Ed.2d 258 (1976). The mere fact that a defendant is black and that a victim is white does not constitutionally mandate such an inquiry. *Lewis v. Commonwealth*, 218 Va. 31, 35-36, 235 S.E.2d 320, 323 (1977). The refusal of the trial court to ask other questions, those concerning the circumstances under which a prospective juror would vote for the death penalty, likewise is not constitutionally objectionable. The voir dire questioning conducted by the trial judge probed many of the areas touched upon by these questions and assured the removal of those who would invariably im-

5. Of the fifteen questions submitted by defense counsel, one question was withdrawn, nine were asked by the trial judge, and five were refused. These five questions were:

"(10) The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?

(11) Do you feel that if a person is to be given the death penalty for the unlawful killing of another person, such penalty should be given only if such killing is of the most severe and aggravated nature?

(13) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty?

(14) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty if there is a probability that the person would commit criminal acts of violence that would constitute a continuing threat to society?

(15) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty if his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder?"

9. Turner introduced a study indicating that black defendants killing white victims "receive the death penalty more frequently than black defendants killing blacks, whites killing blacks, or whites killing whites. The study, however, was based upon statistics compiled in other states and thus was of little utility in establishing the potential of prejudice in Virginia.

pose capital punishment. The court's instructions to the jury clearly delineated the circumstances in which the death penalty could be imposed. Since the questioning actually conducted by the court preserved the defendant's right to a fair and impartial jury, the trial court's refusal to ask the voir dire questions proposed by defense counsel was not an abuse of discretion.

C. EXAMINATION OF PROSPECTIVE JURORS CONCERNING ATTITUDES ABOUT CAPITAL PUNISHMENT

[8] For the reasons stated in *Wayne v. Commonwealth*, 219 Va. 683, 690-91, 251 S.E.2d 202, 207, *cert. denied*, 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979), we reject Turner's contention that the trial court should not have questioned prospective jurors concerning their willingness to impose capital punishment.

[9-11] We likewise believe that the trial court properly struck Samuel Cypress from the venire. After asking Cypress variations of the questions asked of others on the panel,[10] the trial judge concluded that Cypress' objections to capital punishment were absolute. While jurors may not be excluded "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction," *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 1777, 20 L.Ed.2d 776 (1968), those jurors irrevocably committed to voting against the death penalty may be excluded. *Coppola v. Commonwealth*, 220 Va. 243, 250, 257 S.E.2d 797, 802 (1979), *cert. denied*, 444 U.S. 1103, 100 S.Ct. 1069, 62 L.Ed.2d 788 (1980); *Smith v. Commonwealth*, 219 Va. 455, 464, 248 S.E.2d 135, 141 (1978), cert. denied, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979). The trial court's determination that a juror is irrevocably committed to voting against the death penalty will not be disturbed on appeal unless we can say the prospective juror's commitment against the death penalty was not "unmistakably clear." *Smith v. Commonwealth*, 219 Va. at 465, 248 S.E.2d at 141. *Accord, Coppola v. Commonwealth*, 220 Va. at 250, 257 S.E.2d at 802. On the basis of the answers given by Cypress, the trial court reasonably concluded he was irrevocably committed against the death penalty.

D. SEQUESTRATION OF THE JURY

Turner sought and obtained a change of venue from Southampton County to Northampton County. Upon learning of a recent Northampton County case involving the death penalty and another murder in the area, defense counsel moved for another change in venue and for sequestration of the jury, both of which were denied. Turner contends that the refusal to sequester the jury was prejudicial error.

[12-14] As Turner's counsel notes, a judge has discretion in determining whether to sequester a jury. The mere fact of media coverage does not require a judge to sequester a jury. *Thompson v. Commonwealth*, 219 Va. 498, 247 S.E.2d 707 (1978). A trial judge's discretion regarding sequestration extends to cases involving capital punishment. We hold that, in the absence of any indication of pretrial prejudicial publicity, a trial judge has wide discretion in deciding whether to sequester a jury.

10. The complete examination of Cypress appears below:

"THE COURT: Now, Mr. Cypress, do you have any religious or conscientious scruples or objections against the imposition of the death penalty?

MR. CYPRESS: Well, really, I don't go for the death penalty.

THE COURT: Can you say yes or no to that question?

MR. CYPRESS: No.

THE COURT: Or yes?

MR. CYPRESS: Do I have any objection?

THE COURT: Yes.

MR. CYPRESS: Yes.

THE COURT: Is your objection to the death penalty absolute?

MR. CYPRESS: Well, I would say yes.

THE COURT: Could you in a proper case impose the death penalty?

MR. CYPRESS: Didn't hear.

THE COURT: Could you in a proper case impose the death penalty?

MR. CYPRESS: Well, I can't see where it helps any."

III. CONSTITUTIONALITY OF THE DEATH PENALTY PROVISIONS

A. FACIAL CONSTITUTIONALITY

[15] Turner contends that Virginia's statutory provisions concerning the death penalty are facially unconstitutional for reasons previously rejected by us. *See Martin v. Commonwealth*, 221 Va. 436, 440, 271 S.E.2d 123, 126 (1980); *Mason v. Commonwealth*, 219 Va. 1091, 1094–95, 254 S.E.2d 116, 118–19 (1979); *Waye v. Commonwealth*, 219 Va. 683, 698–99, 251 S.E.2d 202, 211 (1979); and *Smith v. Commonwealth*, 219 Va. 455, 476–79, 248 S.E.2d 135, 148–49 (1978). We reaffirm these prior holdings concerning the facial constitutionality of the death penalty statutory provisions.

[16] Turner also argues that the imposition of the death penalty on the basis of a jury's conclusion regarding a defendant's propensity for future crime is unconstitutional.[11] The statutory objective of isolating a criminal, according to Turner, can be accomplished through the less drastic measure of life imprisonment. As Turner acknowledges, *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), upheld as constitutional a Texas statute allowing the imposition of the death penalty where a jury determines, *inter alia*, the defendant would probably commit "criminal acts of violence that would constitute a continuing threat to society." 428 U.S. at 269, 96 S.Ct. at 2955. While the only issue explicitly addressed concerning a defendant's propensity for future criminal conduct was whether the jury was being asked to resolve a question beyond its competency, 428 U.S. at 274–76, 96 S.Ct. at 2955–2958, we believe *Jurek* holds that a defendant's propensity for future criminal acts of violence is an acceptable consideration in determining whether to impose the death penalty. *See also Gregg v. Georgia*, 428 U.S. 153, 183 n.28, 96 S.Ct. 2909, 2930 n.28, 49 L.Ed.2d 859 (1976) (plurality opinion).

11. Turner does not contend that the jury had no basis for concluding he would probably commit "criminal acts of violence that would constitute a continuing serious threat to society." Code § 19.2-264.2. Since 1974, the defendant has been convicted of malicious maiming, escape, unlawful wounding, malicious wounding, and second degree murder. Four of these offenses occurred in the penal system.

B. CONSTITUTIONALITY AS APPLIED

[17] Citing *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), Turner contends there was insufficient evidence to support a conclusion that his conduct in committing the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery." Code § 19.2-264.2. As we noted in *(James Dyrall) Briley v. Commonwealth*, — Va. —, 273 S.E.2d 57 (1980), *Godfrey* rested upon its unique facts. The *Godfrey* prosecutor conceded the defendant had not tortured the victims or committed an aggravated battery upon them. 100 S.Ct. at 1763. Godfrey had no prior criminal record. Thus, the death sentence rested upon the jury's finding that Godfrey's actions had been "outrageously or wantonly vile, horrible or inhuman in that [they] involved ... depravity of mind." 100 S.Ct. at 1767. Rejecting such a conclusion as unconstitutional, the Supreme Court of the United States noted several facts: Godfrey's victims, family members who had caused him "extreme emotional trauma," were killed instantaneously; and shortly after the killings Godfrey acknowledged his involvement and the heinous nature of his crimes. *Id.* Godfrey's crimes were not deemed to reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." *Id.* In summary, the state had not proven "a principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id.*

The second clause of Code § 19.2-264.2 (hereafter, the "vileness" clause) provides specific criteria which must be met before the death penalty can be imposed on the basis of this clause. The conduct in committing the offense must be deemed to be "outrageously or wantonly vile, horrible or

inhuman." Code § 19.2-264.2. Second, the jury must conclude that the conduct establishes one of the following: torture of the victim, an aggravated battery of the victim, or the perpetrator's depravity of mind. *See Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980).

In the present case, the Commonwealth established that Turner's conduct was "outrageously or wantonly vile, horrible or inhuman." Turner first shot Smith in the head without warning. After Smith slumped behind the counter, Bain immediately pleaded with Turner not to fire any more. After the defendant had fired one bullet hitting the rear wall and another one hitting Smith's head, Cosby became nauseous and asked if she could be seated. Rejecting Bain's pleas, Turner then leaned over the counter and fired two bullets into Smith's chest. While Smith was slumped behind the counter, Cosby heard him "gurgling." The evidence also establishes Turner committed an "aggravated battery," a "battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978). After being wounded by Turner, Smith slumped helplessly behind the counter. Unlike Godfrey's victims, Smith did not die instantaneously from a single discharge of a firearm.

[18, 19] Virginia's death penalty statute authorizes the imposition of the death penalty if either the "dangerousness" or "vileness" standard is met. Even if Turner's crime did not meet the "vileness" standard, imposition of the death penalty would be permissible under the "dangerousness" standard.[12] On the basis of Turner's prior criminal record, set forth in footnote 11, the jury could reasonably conclude that the defendant would probably "commit criminal acts of violence that would constitute a continuing serious threat to society." Code § 19.2-264.2.

IV. REFUSAL TO INSTRUCT THE JURY CONCERNING MURDER IN THE COMMISSION OF AN ATTEMPTED ROBBERY

Code § 18.2-31(d), as noted earlier, provides that murder "in the commission of robbery" while armed with a deadly weapon is capital murder. Code § 18.2-32 provides that murder "in the commission of, or attempt to commit," robbery is first-degree murder. Whereas Code § 18.2-32 is violated by a murder in an attempted robbery, Code § 18.2-31(d) is not. To be convicted under Code § 18.2-31(d), the defendant must have committed a robbery.

[20] Turner contends that the jury should have been instructed concerning the lesser offense of first-degree murder because the evidence failed to establish the commission of a robbery. While Turner never had physical possession of the jewelry bags personally, we believe the requirement of asportation has been satisfied in this case. "The degree of asportation necessary to constitute a taking under the common law definition of robbery need be only slight." *Durham v. Commonwealth*, 214 Va. 166, 168, 198 S.E.2d 603, 606 (1973). A perpetrator exercises dominion and control over an object where he commands another to seize the object and the person complies. In this case, Turner at gunpoint commanded Smith and Cosby to place money and valuables into jewelry bags owned by the store. Placing the money and valuables into the bags as requested, Smith and Cosby then put the bags on the counter. Turner exercised dominion and control over the money and valuables when Smith and Cosby asported these items at his command.

12. As in *(James Dyrall) Briley v. Commonwealth*, Va. , 273 S.E.2d 57 (this day decided), the jury returned a sentencing verdict without striking out the inapplicable language ("and" or "or"). Unlike in *Briley*, however, the trial judge in Turner's case refused to ask the jury members, either individually or collectively, whether their sentencing verdict was grounded upon the "dangerousness" or "vileness" standard or both. While the trial judge's refusal was not prejudicial error, it would accord with better practice to determine with certainty the basis for the jury's sentence. Such a procedure would greatly facilitate the process of appellate review.

V. DOUBLE JEOPARDY

Citing *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980), Turner contends that the Double Jeopardy Clause of the United States Constitution [13] was violated when he was convicted of the use of a firearm in the commission of a felony, Code § 18.2-53.1,[14] as well as murder in the commission of a robbery "while armed with a deadly weapon," Code § 18.2-31(d). In *Busic*, the Supreme Court held that 18 U.S.C. § 924(c), providing enhanced punishment for one using or carrying a firearm [15] in the commission of a felony, could not be applied to a defendant using a firearm in the course of a felony that is proscribed by a statute which itself authorizes enhancement if a deadly weapon is used. Both *Busic* and its precursor, *Simpson v. United States*, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978), were based upon a determination of Congressional intent.

[21] The constitutional prohibition of double jeopardy consists of three separate guarantees. (1) "It protects against a second prosecution for the same offense after acquittal. [(2)] It protects against a second prosecution for the same offense after conviction. [(3)] And it protects against multiple punishments for the same offense." *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 2264, 65 L.Ed.2d 222 (1980) quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). In determining whether a defendant has been twice convicted for the "same offense," U.S.Const., amend. V, courts have been guided by the test set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932): "[T]he test to be applied to determine whether there are two offenses or only one, is whether each [statutory] provision requires proof of a fact which the other does not."

[22, 23] We need not resolve whether one convicted of the use of a firearm in the commission of a felony (Code § 18.2-53.1) and murder in the commission of a robbery while armed with a deadly weapon [Code § 18.2-31(d)] has been convicted twice for the "same offense" under the *Blockburger* test.[16] As noted earlier, the defendant's convictions stem from a single criminal trial. Consequently, only the third constitutional guarantee (the guarantee against

13. U.S.Const., amend. V, provides that no one in a criminal case "shall ... be subject for the same offense to be twice put in jeopardy of life or limb."

14. Code § 18.2-53.1 provides that: "It shall be unlawful for any person to use or attempt to use any pistol, shotgun, rifle, or other firearm or display such weapon in a threatening manner while committing or attempting to commit murder, rape, robbery, burglary, malicious wounding as defined in § 18.2-51, or abduction. Violation of this section shall constitute a separate and distinct felony and any person found guilty thereof shall be sentenced to a term of imprisonment of one year for a first conviction and for a term of three years for a second or subsequent conviction under the provisions of this section. Notwithstanding any other provision of law, the sentence prescribed for a violation of the provisions of this section shall not be suspended in whole or in part, nor shall anyone convicted hereunder be placed on probation. Such punishment shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony."

15. Firearm, as defined in 18 U.S.C. § 921, includes a number of destructive devices not generally deemed to be firearms. *See Simpson v. United States*, 435 U.S. at 10, n.4, 98 S.Ct. at 911, n.4.

16. The statutory provisions at issue in this case are similar to those at issue in *Wayne County Prosecutor v. Recorder's Court Judge*, 406 Mich. 374, 280 N.W.2d 793, *appeal dismissed for want of a substantial federal question sub nom. Brantley v. Michigan*, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979) (use of a firearm in the commission of a felony and robbery "while armed with a dangerous weapon"). Under *Hicks v. Miranda*, 422 U.S. 332, 343-45, 95 S.Ct. 2281, 2288-2290, 45 L.Ed.2d 223 (1975), the Supreme Court's dismissals for want of a substantial federal question are dispositive precedent for those issues presented in a petitioner's appeal. In light of our conclusion concerning the significance of legislative intent on the issue before us, it is unnecessary to determine whether the Supreme Court's dismissal for want of a substantial federal question adjudicated whether felony-firearm and robbery "while armed with a dangerous weapon" constituted the same offense under *Blockburger*.

multiple punishments) is at issue in this appeal. The constitutional guarantee against multiple punishments "is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977). Where two or more punishments for separate statutory violations are imposed in a single criminal proceeding, "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to impose." *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 1441, 63 L.Ed.2d 715 (1980) (Blackmun, J., concurring).

[24] The General Assembly has clearly indicated its intent to impose multiple punishments for capital murder and use of a firearm in the commission of a felony. Code § 18.2-53.1 provides that a "[v]iolation of this section shall constitute a separate and distinct felony" and that the punishment imposed for violating Code § 18.2-53.1 "shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony." This language reflects an unambiguous intent to authorize multiple punishment for a single criminal transaction. Thus, Turner's double jeopardy claim has no merit.

VI. REVIEW REQUIRED BY CODE § 17-110.1

[25] Code § 17-110.1(C)(1) requires that we consider and determine whether the death sentence "was imposed under the influence of passion, prejudice or any other arbitrary factor." We have carefully considered the record in this case and find no indication that the death sentence was the product of these enumerated factors.

[26] Code § 17-110.1(C)(2) requires us, after "considering both the crime and the defendant," to determine whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases." We have reviewed death sentences in those cases involving murder in the commission of a robbery while armed with a deadly weapon. *(James Dyral) Briley v. Commonwealth*, — Va. —, 273 S.E.2d 57 (1980); *(Linwood) Briley v. Commonwealth*, — Va. —, 273 S.E.2d 48 (1980); *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980); *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979), *cert. denied*, 444 U.S. 1103, 100 S.Ct. 1069, 62 L.Ed.2d 788 (1980). While the atrociousness involved in Turner's murder does not rise to the level evidenced in *Stamper*, *(James Dyral) Briley*, or *Coppola*, Turner's murder is just as brutal as the murders in *(Linwood) Briley* and *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979), *cert. denied*, 444 U.S. 1049, 100 S.Ct. 741, 62 L.Ed.2d 736 (1980). Moreover, the defendant's criminal record, detailed in footnote 11, is one of the most extensive we have reviewed under Code § 17-110.1(C). Turner, unlike any of the other defendants except for Mason,[17] had been convicted for a previous murder. Certainly his prior criminal record is as extensive or more extensive than the criminal records of those other defendants sentenced to death for murder in the commission of an armed robbery. Having considered "both the crime and the defendant," Code § 17-110.1(C)(2), we conclude the death sentence is not excessive or disproportionate to the sentences imposed in similar cases.

VII. OTHER ASSIGNMENTS OF ERROR

[27-29] For the reasons stated in *(James Dyral) Briley v. Commonwealth*, *supra*, and *(Linwood) Briley v. Commonwealth*, *supra*, we reject Turner's contention that a further change in venue was necessary. We like-

17. *Mason v. Commonwealth*, 219 Va. 1091, 254 S.E.2d 116, *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979).

wise reject his argument that photographs of the victim and crime scene should not have been introduced into evidence. *Waye v. Commonwealth*, 219 Va. at 692, 251 S.E.2d at 207-08. Moreover, Turner's contention that the jury should have been given an instruction concerning the possibility of parole has no merit. *Stamper v. Commonwealth*, 220 Va. at 278, 257 S.E.2d at 821; *Clark v. Commonwealth*, 220 Va. at 214, 257 S.E.2d at 792.

Turner raises several other assignments of error, discussed neither in his brief nor in oral argument. After examining each of these assigned errors, we conclude that they have no merit and require no further discussion.

Having given the defendant's case both appellate and independent review, we conclude there is no reversible error in either his convictions or sentences, and we find no other reason to disturb or commute his death sentence. Therefore, we affirm the judgments pronounced by the trial court.

Affirmed.

Linwood Earl BRILEY

v.

COMMONWEALTH of Virginia.

Record No. 800690.

Supreme Court of Virginia.

Nov. 26, 1980.

The Circuit Court, City of Richmond, William E. Spain, J., convicted defendant of capital murder for willful, deliberate, and premeditated killing occurring in the commission of a robbery while armed with a deadly weapon, and defendant appealed. The Supreme Court, Carrico, J., held that: (1) trial court did not err in denying motion for change of venue; (2) trial court did not err in ruling that if defense counsel examined prosecution witness concerning other crimes involved in plea bargain, Commonwealth would be permitted to question witness with respect to defendant's participation in the same offenses; (3) trial court did not err in taking the position that jury would be permitted only either to find defendant guilty of capital murder or to acquit him; (4) trial court's instruction sufficiently informed jury of its option to fix punishment at life imprisonment even if jury also found existence of aggravating circumstances permitting recommendation of death penalty; and (5) imposition of death penalty was neither excessive nor disproportionate.

Affirmed.

1. Criminal Law ⇐121

In murder prosecution, trial court did not abuse its discretion in denying motion for change of venue.

2. Jury ⇐103(1)

Prospective jurors who had read accounts or listened to broadcasts concerning criminal activities of defendant but who had not formed opinion concerning defendant's guilt and who stated unequivocally that they would determine case solely upon coverage presented in court, were not disqualified from service on defendant's jury.

3. Criminal Law ⇐126(1)

Claim that sheer volume of media coverage required change in location of trial, was not, standing alone, sufficient to require change of venue.

4. Criminal Law ⇐396(1)

Where chief prosecution witness stated that, in return for his truthful testimony, Commonwealth had promised he would "get no more time than anyone else in this case," where plea agreement encompassed other cases in which witness was charged along with defendant and his brothers, and where defense counsel proposed to inquire fully into plea agreement and other crimes, trial court did not err in ruling that if defense

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

FILED

MAY 23 1984

CLERK, U.S. DISTRICT COURT
NORFOLK, VIRGINIA

WILLIE LLOYD TURNER, #95190,

Petitioner

v.

GARY BASS, SUPERINTENDENT, ET AL.,

Respondents

CIVIL ACTION
NO. 83-501-N

MEMORANDUM ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner is a prisoner in the Virginia penal system.

Petitioner is being detained pursuant to a judgment of the Circuit Court of Southampton County, Virginia of February 19, 1980, wherein petitioner was convicted of capital murder, use of a firearm in the commission of murder, and possession of a sawed off shotgun in the commission of robbery. He was sentenced to respective sentences of death, one year in the penitentiary, and a life term in the penitentiary. The death sentence was imposed in a separate hearing from the trial on guilt or innocence as is required in Va. Code §§ 19.2-264.3 and 19.2-264.4 (1950). These convictions arose out of events occurring on July 12, 1978, during which petitioner shot and killed the proprietor of a jewelry store in Franklin, Virginia.

Petitioner appealed his convictions to the Supreme Court of Virginia. On November 26, 1980, that Court issued a written opinion in which it affirmed petitioner's conviction in all respects.

(f) Petitioner argues that execution by means of electrocution constitutes cruel and unusual punishment. This argument is contrary to the decision of the Supreme Court and is thus without merit. In Re Kemmler, 136 U.S. 436 (1890); Gregg v. Georgia, 428 U.S. at 170, 178; See also Gray v. Lucas, 710 F.2d 1048, 1060 (5th Cir. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 211 (1983).

Voir Dire

Petitioner has alleged that the voir dire conducted at his trial was flawed in several respects.

The trial judge conducted the voir dire, using certain of the questions which counsel for both sides had submitted to him. The prospective jurors were called forward in groups of five while the remainder were excluded from the courtroom. Those five were first asked, as a group, to respond to several questions. Each prospective juror was then asked individually as to his or her feelings concerning the death penalty. These responses were elicited for the purpose of "death-qualifying" the jury, a process approved in Witherspoon v. Illinois, 391 U.S. 510 (1968); Adams v. Texas, 448 U.S. 38 (1980). The Supreme Court in Witherspoon held that those prospective jurors who express an absolute opposition to the death penalty may be excluded from service as jurors in a capital murder case. The trial court struck for cause three jurors who expressed an absolute opposition to the imposition of the death penalty. (The trial court also struck several prospective jurors who stated that

they believed that the death penalty was the appropriate punishment for anyone convicted of murder.)

The petitioner argues that there was error both in the type of questions asked and in the manner in which the voir dire was conducted. Each complaint will be deal with below.

(a) Petitioner's first assignment of error involves the death qualification of the jury as authorized in Witherspoon. Petitioner argues that the death qualification process yields a venire which does not represent a cross-section of the community and a jury which is conviction-prone. Petitioner has offered to produce data which, he contends, will establish the truth of his assertions. Whil the arguments which petitioner made at the earlier proceedings were less fully developed than they now appear to be, this Court will consider petitioner's present arguments in their entirety.

The Fourth Circuit has spoken twice on this issue. First, one of the petitioner's claims in Barfield v. Harris, 719 F.2d 58 (4th Cir. 1983) was identical to the argument now made by petitioner in the case at bar. In Barfield, the Fourth Circuit affirmed the distfict court's decision to deny relief to Barfield on this claim. Barfield v. Harris, 540 F.Supp. 451, 464 (E.D.N.C. 1982). Second, the petitioner in Hutchins v. Woodard, et al., No. 84-8050, slip op. (4th Cir. March 13, 1984) sought a certificate of probable cause to appeal and a stay of execution on the same ground that Turner pursues here. The Fourth Circuit declined to grant the certificate and the stay. In the lead opinion, Judge Murnaghan wrote, inter alia, that Hutchins did not have a decided or substantial chance of prevailing on the merits of this issue. See, Barefoot v. Estelle,

___ U.S. ___, 103 S.Ct. 3383 (1984). It appears to this Court that Judge Phillips may have reached a similar conclusion. It is important to note that the decision in Hutchins followed the issuance of the opinion in Keeten, et al. v. Garrison, 578 F.Supp. 1164 (W.D. N.C. 1984) in which Judge McMillan found merit in the same argument which petitioner now makes to this Court. Although the Fourth Circuit made quite clear its desire that Hutchins was not to be considered res judicata or stare decisis on this issue, this Court reads the opinions of Judges Murnaghan and Phillips as indicating their belief that the view expressed in Keeten will probably not prevail in this Circuit.

Moreover, a significant number of courts which have treated this issue have disagreed with the position taken by petitioner, e.g., Corn v. Zant, 708 F.2d 549 (11th Cir. 1983); Smith v. Balkcom, 660 F.2d 573; Spinkellink v. Wainwright, 578 F.2d 582. While it is true that two district courts recently have found merit in petitioner's claim, Keeten, 578 F. Supp. 1164; Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983), this Court is impressed with the reasoning of those cases which reject petitioner's arguments. Indeed, the decisions of these courts establish that, even assuming the validity of the social science data which petitioner would proffer to substantiate his claim, see, Keeten, 578 F.Supp. 1164; Grigsby, 569 F.Supp. 1273, petitioner's argument must fail. Accordingly, the Court adopts the reasoning in Spinkellink, 578 F.2d at 591-99, and concludes that petitioner is not entitled to relief as to this claim. See also, Barfield, 540 F.Supp. at 464. In addition, this Court concludes that an evidentiary hearing on this claim is not warranted. See, Townsend v. Sain, 372 U.S. 293 (1963).

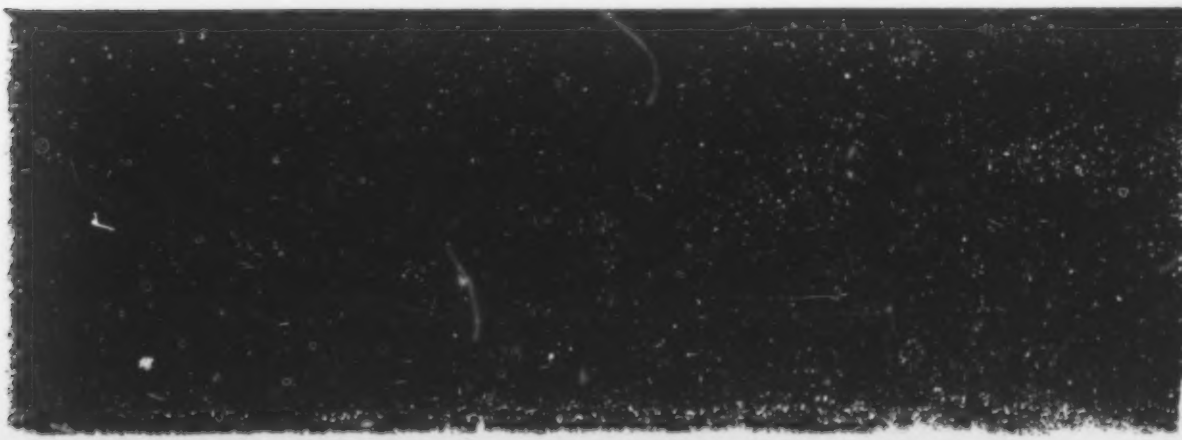
(b) As discussed above, the trial judge questioned the prospective jurors individually in order to ascertain if any one should be excluded on Witherspoon grounds. Petitioner has argued that Samuel Cypress was improperly struck from the jury because, according to petitioner, Cypress did not expresss an unequivocal opposition to the death penalty. However, the Court finds petitioner's argument to be without merit.

According to the principles announced in Witherspoon, a juror may not be excluded merely because he or she objects to the death penalty. Witherspoon provides for the exclusion of those prospective jurors,

> . . . who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them . . .

Id. at 522-23, n. 21 (emphasis in original); Adams v. Texas, 448 U.S. 38.

At the conclusion of Cypress' individual voir dire, the trial court granted the Commonwealth's motion and excused Cypress for cause. Tr. at 91 (December 3, 1979). While the rule in Witherspoon and Adams is clear, there is no magic formula by which a trial judge can determine who is properly excludible. Therefore, it becomes important for the trial judge to gauge a prospective juror's demeanor and manner of responding to the questions. As a result, trial judges are generally given a great deal of discretion in evaluating juror impartiality. Darden v. Wainwright, 699 F.2d 1031 (11th Cir. 1983). Moreover, this Court must defer to the factual finding made by the state court on this issue. 28 U.S.C. § 2254(d); Sumner v. Mata, 449 U.S. 539 (1981).



This Court is satisfied that the trial judge acted properly in excusing Cypress from service on the jury. Throughout the voir dire, the judge demonstrated a familiarity with the principles embodied in Witherspoon and Adams. In questioning Cypress, the trial judge carefully followed up Cypress' initial, and somewhat equivocal, response. The judge received answers which he felt required that Cypress be removed for cause. In sum, this Court refuses to accede to petitioner's request that we second guess the finding of the trial judge on this matter.

(c) Petitioner has complained that his counsel was denied the opportunity to conduct voir dire, in violation of petitioner's Sixth and Fourteenth Amendment rights. At trial, petitioner's counsel timely requested that they be permitted to conduct, in whole or in part, the voir dire of the prospective jurors. The trial judge denied counsel's motion and conducted the entire voir dire himself.

On direct appeal, the Supreme Court of Virginia settled any question as to the trial court's authority to conduct the voir dire under Va. Code § 8.01-358 and Supreme Court Rule 3A:20; Turner v. Commonwealth, 273 S.E.2d 36. Naturally, this Court defers to the interpretation of Virginia law provided by the Virginia Supreme Court. Wicker v. National Surety Corporation, 330 F.2d 1009, 1012 (4th Cir. 1964), cert. denied, 379 U.S. 838 (1964).

Petitioner contends, however, that this procedure deprived him of his constitutional right to a fair trial. In United States v. Duke, 409 F.2d 669 (4th Cir. 1969), cert. denied, 397 U.S. 1062 (1970), the Fourth Circuit held that Rule 24 of the Federal Rules of Criminal Procedure is constitutional, including that aspect of

the Rule which permits the trial court to conduct the voir dire. The Court concluded that there were substantial reasons for permitting the trial court to conduct voir dire. These reasons are even more compelling in the Witherspoon context where the trial judge must decide whether a prospective juror is unequivocally opposed to the death penalty. In such a situation, where a person's conscience and moral beliefs must be probed, it might be preferable for the judge himself, as an impartial party, to conduct the voir dire. Indeed there is the possibility that counsel for either side could, through their questions, confuse or prejudice the prospective jurors. In sum, the trial judge's decision to conduct the voir dire did not infringe any of petitioner's constitutional rights.

(d) Petitioner has also complained that the trial court deprived him of a fair trial by refusing to permit individual voir dire, to ask prospective jurors as to their racial attitudes and to probe their understanding of the presumption of innocence. Petitioner's argument fails.

The trial judge retains wide discretion in determining the way in which voir dire will be conducted. Ristaino v. Ross, 424 U.S. 589, 594 (1976); Aldridge v. United States, 283 U.S. 308 (1931). As noted above, the trial judge chose to question the jurors individually as to their feelings regarding the death penalty, although the other questions were asked of the jurors as a group. The decision as to whether, and to what extent, the prospective jurors should be questioned individually falls squarely within the ambit of the judge's discretion. This Court finds no reason, of a constitutional dimension, to upset the trial judge's decision to conduct the voir dire as he did.

This Court also will not disturb the trial court's decision not to question jurors as to their racial attitudes. The Supreme Court considered this issue in Ristaino, 424 U.S. 589. In Ristaino, the Court held that defendant was not entitled to have prospective jurors questioned about racial prejudice because the facts in that case "did not suggest a significant likelihood that racial prejudice might infect [defendant's] trial." Id. at 598. Compare, Ham v. South Carolina, 409 U.S. 524 (1973) (black defendant was civil rights activist asserting defense that he was "framed"). In Ristaino, unlike in Ham, racial issues were not "inextricably bound up with the conduct of the trial." Ristaino at 596. The Court further stated that the mere fact that the defendant was black and the victim was white did not require the trial court to inquire as to the racial attitudes of the prospective jurors. Id. at 597.

In the case at bar, petitioner has not shown that an investigation of the racial attitudes of prospective jurors was necessary as racial issues are not inextricably bound up with the facts at trial. And as in Ristaino, the fact that petitioner is black and his victim was white did not entitle petitioner to have such questions asked. (Petitioner has cited Rosales-Lopez v. United States, 451 U.S. 182 (1981) as support for his position. However, that case does not, in any way, affect the conclusion reached by this Court. The plurality opinion in Rosales-Lopez, joined in this respect by Justices Burger and Rehnquist, reiterates that the Ristaino standard is to be used to determine when the Constitution requires that the racial attitudes of prospective jurors be investigated. Id. at 189-90.)

Finally, petitioner has argued that the trial judge never inquired as to the ability of the prospective jurors to understand and apply the presumption of innocence. There is no merit to this contention. The trial judge asked all prospective jurors whether they had "formed any opinion with regard to the guilt or innocence" of the petitioner. E.g. Tr. at 47 (December 3, 1979). None of the prospective jurors indicated that they had done so. There was, therefore, no need for the trial judge to inquire further. In light of the deference to be accorded the trial judge, this Court sees no constitutional infirmity with the way the judge handled the voir dire.

(e) Finally, the petitioner has argued that he has a constitutional right to meaningful voir dire so that he may make intelligent peremptory challenges. Petitioner claims this right was infringed here. However, the Constitution does not guarantee petitioner a right to exercise peremptory challenges at all. Swain v. Alabama, 380 U.S. 202, 219 (1966); see, United States v. Rucker, 557 F.2d 1046 (4th Cir. 1977).

The trial judge gave petitioner the opportunity to exercise peremptory challenges. Petitioner has not shown that he was unable to exercise them properly. Moreover, as discussed above, the trial judge has much discretion in conducting the voir dire. This Court concludes after reviewing the record, that the voir dire did not impermissibly infringe the petitioner's exercise of the peremptory challenges he was allotted.

(f) Petitioner argues that the trial court deprived him of his right to due process when it refused to continue the trial and to sequester the jury. Petitioner contends that these measures

4,600 pounds of marijuana. This sentence was within the limits set by Congress.

After a consideration of all of the appellant's arguments, the decision of the trial court is affirmed.

AFFIRMED.

Willie Lloyd TURNER, Appellant,

v.

Gary BASS, Superintendent, Appellee.

No. 84-4004.

United States Court of Appeals, Fourth Circuit.

Argued Oct. 2, 1984.

Decided Jan. 25, 1985.

A petition was filed seeking a writ of habeas corpus. The United States District Court for the Eastern District of Virginia, John A. McKenzie, Chief Judge, denied the petition, and appeal was taken. The Court of Appeals, Widener, Circuit Judge, held that: (1) voir dire on racial prejudice was not constitutionally mandated in the petitioner's capital murder prosecution; (2) the state trial court's determination that a juror was absolutely opposed to the death penalty was supported by the evidence; (3) the petitioner's counsel's performance in handling the psychiatric defense during the sentencing phase of the trial was reasonable under prevailing professional norms, and (4) the use of the vileness criterion as it has been limited by the Virginia Supreme Court was proper.

Affirmed.

James Dickson Phillips, Circuit Judge, concurred specially with opinion.

1. Jury ⇐131(6)

Defendant's constitutional right to be tried by impartial jury does not entitle defendant to examine jurors on voir dire about every matter that may prejudice jury or against defendant. U.S.C.A. Const. Amends. 6, 14.

2. Jury ⇐131(6)

Where special circumstances exist, criminal defendant may have constitutional right to have veniremen questioned on racial prejudice. U.S.C.A. Const.Amends. 6, 14.

3. Jury ⇐131(6)

Fact that black petitioner was charged with capital murder was not in and of itself special circumstance which would give petitioner constitutional right to have veniremen questioned on racial prejudice. U.S.C.A. Const.Amends. 6, 14.

4. Jury ⇐131(6)

Fact that black petitioner was charged with capital murder of white victim was not sufficient special circumstance to give petitioner constitutional right to have veniremen questioned on racial prejudice. U.S.C.A. Const.Amends. 6, 14.

5. Jury ⇐131(6)

State court, in prosecution of black petitioner for capital murder of white victim, did not commit constitutional error in refusing to ask prospective jurors whether fact that victim was white and petitioner was black would prejudice them against petitioner or affect their ability to render fair and impartial verdict based solely on evidence. U.S.C.A. Const.Amends. 6, 14.

6. Jury ⇐108

State court's determination that prospective juror in capital murder prosecution was absolutely opposed to the death penalty in support of its decision to strike juror for cause was supported by the record.

7. Jury ⇐108

Even if Court of Appeals, in renewing denial of petition for habeas corpus, was required to make de novo review of prospective juror's qualification to serve as

jury, state trial judge could reasonably have concluded, considering juror's responses in toto, that he could not consider imposition of death penalty in the proper circumstance. 28 U.S.C.A. § 2254(d).

8. Habeas Corpus ⇐59

District court's determination that no evidentiary hearing was required on petitioner's claim that he received ineffective assistance of counsel during penalty phase of capital murder prosecution was proper. 28 U.S.C.A. § 2254(d); U.S.C.A. Const. Amend. 6.

9. Habeas Corpus ⇐59

When habeas petitioner presents facts which, if proved, would entitle him to relief, federal court can receive that evidence at hearing. 28 U.S.C.A. § 2254(d).

10. Habeas Corpus ⇐59

Evidentiary hearing on federal habeas corpus proceeding is required only if habeas petitioner establishes one or more of specified criteria. 28 U.S.C.A. § 2254(d).

11. Habeas Corpus ⇐59

No hearing is required on habeas corpus petition if facts alleged by petitioner and assumed to be true are insufficient to support a claim. 28 U.S.C.A. § 2254(d).

12. Criminal Law ⇐641.13(2)

In capital murder prosecution, petitioner's attorney's actions with respect to psychiatric testimony offered in mitigation was reasonable under prevailing professional norms and, thus, did not amount to ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

13. Homicide ⇐354

In state capital murder prosecution, ample evidence supported jury's verdict finding dangerousness criterion as aggravating factor. U.S.C.A. Const.Amends. 8, 14; Va.Code, § 19.2-264.4, subd. c.

14. Homicide ⇐354

Vileness criterion of Virginia's capital murder statute which has been construed to require not only outrageously or wantonly vile, horrible or inhuman conduct, but also that conduct involved either torture, aggravated battery of victim or perpetrator's depravity of mind, was satisfied where petitioner had been convicted previously of malicious maiming, escape, unlawful wounding, malicious wounding and second-degree murder, four offenses occurring while he was in prison. U.S.C.A. Const.Amends. 8, 14; Va.Code, § 19.2-264.4, subd. c.

15. Homicide ⇐311

In state capital murder prosecution, it was not necessary to instruct jury on each term in aggravating circumstances at sentencing stage of trial. U.S.C.A. Const. Amends. 8, 14; Va.Code, § 19.2-264.4, subd. c.

16. Criminal Law ⇐863(1)

In sentencing phase of state capital murder prosecution, petitioner was not entitled, in response to jury's request in deliberations as to what life imprisonment entailed, to instruction on subject of parole. U.S.C.A. Const.Amends. 5, 14.

J. Lloyd Snook, III, Charlottesville, Va. (Paxson, Smith, Gilliam & Scott, Charlottesville, Va., on brief), for appellant.

Robert H. Anderson, III, Asst. Atty. Gen., Richmond, Va. (Gerald L. Baliles, Atty. Gen. of Va., Richmond, Va., on brief), for appellee.

Before WIDENER, HALL and PHILLIPS, Circuit Judges.

WIDENER, Circuit Judge:

In December 1979 Willie Lloyd Turner was tried by a jury in Northampton County, Virginia and found guilty of capital murder.[1] Pursuant to Va.Code § 19.2-264.4, the jury sentenced Turner to death. Turner unsuccessfully appealed his conviction and sentence to the Virginia Supreme Court. *Turner v. Commonwealth*, 221 Va. 513, 273 S.E.2d 36 (1980). The United

1. Turner was indicted in Southampton County, Virginia. A motion for a change of venue was granted and he was tried in Northampton County.

States Supreme Court denied Turner's petition for a writ of certiorari. 451 U.S. 1011, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981).

Turner then filed a petition for a writ of habeas corpus in the circuit court of Southampton County, Virginia. That petition was denied. The Virginia Supreme Court affirmed that denial. The United States Supreme Court once again denied Turner's petition for a writ of certiorari. — U.S. —, 103 S.Ct. 2465, 77 L.Ed.2d 1341 (1983).

Turner next sought relief in the federal courts. On July 27, 1983, he filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, raising numerous constitutional issues.[2] That petition was amended on March 20, 1984. The petition was initially denied on May 23, 1984, and a motion to alter or amend that judgment was denied July 19, 1984. The district court issued a certificate of probable cause, thus allowing Turner to appeal the denial of habeas corpus relief. This denial serves as the basis of the present appeal.[3] We affirm.

A brief summary of the facts leading to Turner's conviction are necessary for an understanding of the issues presented. On July 12, 1978, Turner entered Smith Jewelers in Franklin, Virginia, armed with a sawed-off shotgun, and demanded that the store owner W. Jack Smith give him money and jewelry. A store employee and a customer were also present in the store at the time. Another customer entered during the robbery. Smith set off the store's silent alarm, and momentarily police officer A.D. Bain arrived on the scene and inquired about the activation of the alarm. Bain's pistol was taken by Turner. Turner then told Smith to turn the alarm off [illegible] keep filling bags with jewelry.

Turner soon became concerned that [illegible] police officers would respond to the alar[illegible] He then fired a pistol shot into the back [illegible] the store. Officer Bain tried to ass[illegible] Turner that no other policemen would [illegible] answering the alarm. Without any war[illegible] ing and with no provocation, Turner [illegible] shot store owner, Smith, in the head. [illegible] shot in the head did not kill Smith. [illegible] passed through his scalp, but appar[illegible] not through the skull. It caused bleed[illegible] on the coverings of the brain and brui[illegible] the brain's surface. Smith slumped [illegible] then fell helplessly to the floor. Offic[illegible] Bain pleaded with Turner not to shoot [illegible] one else, and offered to take Turner [illegible] where that he wanted to go. Turner t[illegible] stated that he was "going to kill [illegible] [Smith] for snitching on [him]." He t[illegible] shot Smith, who was then still living, [illegible] less and "gurgling," twice in the che[illegible] One of these shots was in the lungs, one [illegible] the heart. Officer Bain was then able [illegible] disarm and subdue Turner. Smith died [illegible] the wounds in his chest.

I

We turn now to the several issues r[illegible] on appeal. First, Turner contends that [illegible] district court erred in upholding the t[illegible] court's refusal to permit examination of [illegible] jury on voir dire concerning racial pr[illegible] dice. He contends that because he is b[illegible] and the murder victim was white the t[illegible] court should have questioned jurors a[illegible] the existence of racial prejudice, and [illegible] his constitutional rights to a fair trial w[illegible] violated by the court's refusal.[4]

[1, 2] A criminal defendant such as [illegible] defendant here has a constitutional r[illegible]

2. Turner has exhausted his state remedies as required by *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

3. Turner's execution date was set for September 19, 1984. On August 28, 1984, this court entered a stay pending further order of this court.

4. Turner's counsel requested that the jurors be asked the following:

> The defendant, Willie Lloyd Turner, is a [illegible] ber of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will [illegible] facts prejudice you against Willie Lloyd Tur[illegible] er or affect your ability to render a fair and [illegible] impartial verdict based solely on the evidence?

under the Sixth and Fourteenth Amendments to the Constitution to be tried by an impartial jury. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). This does not entitle the defendant, however, to examine jurors on voir dire about every matter that may prejudice a juror against the defendant. But, where special circumstances exist, a criminal defendant may have a constitutional right to have veniremen questioned on racial prejudice. *Ristaino v. Ross*, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976).

The Supreme Court found such special circumstances in *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973). Ham, a black man, was convicted in a South Carolina court of possession of marijuana. His defense at trial was that he was framed by law enforcement officials because of his civil rights activities. Ham was known throughout the community for his civil rights work. The trial court refused to question the jurors about possible racial prejudice against Ham. The Court found a due process violation in the trial court's failure to interrogate the jurors on the issue of racial bias.

Three years after its decision in *Ham*, the Supreme Court refused to create a per se rule requiring voir dire on racial prejudice in any case where the defendant is of a different race from the victim. *Ristaino v. Ross, supra*. Ross, a black male, was tried in a Massachusetts court for armed robbery, assault and battery with a dangerous weapon and assault and battery with the intent to commit murder. The victim was a white security guard. The Court rejected the court of appeals' decision that such voir dire should be required because the case involved a violent crime committed by a black against a white security guard. Such a holding, the Court said, interpreted *Ham* too broadly. *Ham* represented a fact specific situation in which racial issues were "inextricably bound up with the conduct of the trial." *Ristaino, supra*, 424 U.S. at 597, 96 S.Ct. at 1021. The Court concluded that the mere fact that the victim was white and the defendant was black was less likely to distort the trial than were the special factors present in *Ham*. "The circumstances did not suggest a significant likelihood that racial prejudice might infect Ross' trial." 424 U.S. at 598, 96 S.Ct. at 1022. Thus, voir dire on racial prejudice was not constitutionally mandated.

Turner contends that his case involves special circumstances requiring voir dire on racial prejudice because he is charged with capital murder and that in and of itself is a special circumstance. He also contends that defendants who murder whites are more likely to be sentenced to death and therefore a special circumstance is created by this likelihood.

[3, 4] We reject both contentions. There must exist some special circumstance in the facts surrounding a particular case before such voir dire is constitutionally required. We are of opinion that the nature of the crime or punishment itself is not a special circumstance. Nor is the fact that the victim is white and the defendant black, as *Ristaino* specifically so held. We are also of opinion that the fact that a larger percentage of white victims' assailants are executed than are other races is not a special circumstance. "There is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups." *Rosales-Lopez*, infra, 451 U.S. at 190, 101 S.Ct. at 1635.

An even more recent pronouncement from the Supreme Court involving a Mexican defendant confirms that "[o]nly when there are more substantial indications [than a victim of one race and the defendant of another or a defendant of any particular race] of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the juror's ability to deal impartially with the subject amount to an unconstitutional abuse of discretion." *Rosales-Lopez v. United States*, 451 U.S. 182, 190, 101 S.Ct. 1629, 1635, 68 L.Ed.2d 22 (1981).

[5] The broad inquiry in each case must be "... whether under all of the circumstances presented there was a constitution-

ally significant likelihood that, absent questioning about racial prejudice, the jurors would not be 'indifferent as [they stand] unsworne.'" *Ristaino*, 424 U.S. at p. 596, 96 S.Ct. at p. 1021. An examination of all of the circumstances presented here does not indicate there was a constitutionally significant likelihood that absent questioning about racial prejudice the jurors would not be indifferent as they stood unsworn. As Turner concedes, there is nothing special in the facts surrounding this case to suggest racial antagonism. That being true, the trial court did not commit constitutional error by refusing to ask the jurors the question copied in footnote 4 in the margin.

II

Turner next contends that the exclusion of juror Samuel Cypress for cause violated his Sixth and Fourteenth Amendment rights. Cypress was struck for cause over defense objections after the following colloquy:

> Now, Mr. Cypress, do you have any religious or conscientious scruples or objections against the imposition of the death penalty?
>
> Mr. Cypress: Well, really, I don't go for the death penalty.
>
> The Court: Can you say yes or no to that question?
>
> Mr. Cypress: No.
>
> The Court: Or yes?
>
> Mr. Cypress: Do I have any objection?
>
> The Court: Yes.
>
> Mr. Cypress: Yes.
>
> The Court: Is your objection to the death penalty absolute?
>
> Mr. Cypress: Well, I would say yes.
>
> The Court: Could you in a proper case impose the death penalty?
>
> Mr. Cypress: Didn't hear.
>
> The Court: Could you in a proper case impose the death penalty?
>
> Mr. Cypress: Well, I can't see where it helps any.

Turner argues that Cypress' responses do not show that he was irrevocably committed before trial to vote against the death penalty. In particular, Turner challenges the Virginia court's interpretation of Cypress' response that he did not see that it helped any when queried about whether he could impose the death penalty.

In *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and again in *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), the Court held that the State may strike for cause jurors whose opposition to the death penalty would prevent them from considering all the penalties provided by state law. That opposition must be such as to lead the juror to either ignore the law or violate his oath as a juror. The fact that a juror may be opposed to the death penalty does not provide grounds to strike him for cause as long as he could consider imposition of the death penalty in an appropriate case.

[6] In this case, the state trial judge, after questioning Cypress and observing his demeanor, determined that cause existed to strike him from the jury panel. The district court refused to disturb the trial judge's findings, and we agree.

Under 28 U.S.C. § 2254(d), factual findings such as those of a state trial court[5] are presumed to be correct in a habeas corpus action in federal court unless, among other things not applicable here, those determinations are not fairly supported by the record. That standard applies to our consideration of Cypress' qualification to serve on the jury. In *Patton v. Yount*, — U.S. —, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984), a case involving the partiality of a juror, much the same question as that presented here, the Court decided that, on habeas corpus review, when the question was whether or not a juror could set aside an opinion, the presumption of § 2254(d) applied, and that "special def-

5. The trial court's finding was specifically affirmed by the Virginia Supreme Court. 273 S.E.2d at p. 43.

erence" should be given to the finding of the trial court. The Court held that the juror in question was properly seated despite some ambiguous answers, much as here. "Jurors thus cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially." at ——, 104 S.Ct. at 2893.

The question we must address therefore is whether there is fair support in the record for the trial court's conclusion that Cypress' opposition to the death penalty was absolute. We hold that the record supports that conclusion. Cypress stated that he opposed imposition of the death penalty. Following further questioning, Cypress said that this opposition was absolute. While his response to the trial judge's last question may have been ambiguous, such ambiguity has been resolved by the trial judge whose "... resolution of such questions is entitled, even on direct appeal, to special deference." at ——, 104 S.Ct. at 2892. The trial judge asked the proper questions required by *Witherspoon* and *Adams*. He was in the best position to observe Cypress' demeanor and intonation during voir dire. We refuse to disturb his decision that Cypress' opposition to the death penalty was absolute.

[7] We do not construe *Keeten v. Garrison*, 742 F.2d 129 (4th Cir., 1984), to require us to make a de novo review of Cypress' qualification to serve on the jury, as Turner argues. Rather, we think it is consistent with *Patton*. But, assuming arguendo Turner's construction of *Keeten*, our bolding would be the same. The trial judge could have reasonably concluded, after considering Cypress' responses in toto that he could not consider imposition of the death penalty in the proper circumstance, and we think his finding is supported by the record.

III

As Turner notes in his brief, this court's recent opinion in *Keeten* precludes his argument that his constitutional right to an impartial jury was violated because a death qualified jury is claimed to be biased in favor of the prosecution. *Keeten* was recently reaffirmed by this court in *Briley v. Booker*, (1984).

IV

[8] Turner claims error in the district court's denial of an evidentiary hearing on his claim that he was denied effective assistance of counsel at the penalty phase of his trial. He does not claim ineffective assistance at the stage of the trial ascertaining guilt or innocence. The district court found that Turner's trial was not a case in which counsel had failed to present any evidence, or only evidence of marginal value, and concluded that Turner's attorneys had presented evidence of his psychological history and mental state at the time of the murder, which are matters in mitigation specifically included in Virginia Code § 19.2-264.4. It concluded that counsel had complied with the standard set out in *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir.1977), cert. den. 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978), and that no evidentiary hearing was required. We agree.

[9–11] When a habeas petitioner presents facts which, if proved, would entitle him to habeas corpus relief, a federal court can receive that evidence at a hearing. *Townsend v. Sain*, 372 U.S. 293, 312, 83 S.Ct. 745, 756, 9 L.Ed.2d 770 (1963). An evidentiary hearing in a federal habeas corpus proceeding is required only if the habeas petitioner establishes one or more of the enumerated criteria of 28 U.S.C. § 2254(d) or in *Townsend*, supra, at 312–318, 83 S.Ct. at 756–759. *Shaw v. Martin*, 733 F.2d 304 (4th Cir.1984). Where a state court has decided the merits of a claim but made no express findings of fact, the district court may be able to reconstruct those findings without a hearing. Of course no hearing is required if the facts alleged by the petitioner and assumed to be true are insufficient to support a claim.

On appeal, Turner confines himself wholly to the defense attorneys' treatment of the psychological evidence at the penalty stage of the trial, if we include the side claim that the attorneys did not produce "the corroborating evidence necessary to make credible a psychological or mitigating defense." To place this contention in proper perspective, a brief review of the claim is in order. Following Turner's conviction, he employed other counsel to prosecute his appeal. These are the same attorneys who are presently in the case. They have represented Turner at least since May 1980, the date of filing of Turner's brief in the Supreme Court of Virginia in the appeal of the criminal conviction.

Following affirmance of Turner's conviction, he filed a petition for habeas corpus in the state court. So far as concerns us here, the only pertinent contention there made was that "counsel failed to develop and present adequately the psychiatric evidence sufficient to support a finding of the presence of mitigating mental abnormalities." That petition was dismissed and no written elucidation or explanation of the contention was ever brought to the attention of the trial court prior to its order of February 10, 1982 dismissing the petition. On April 6, 1982, however, Turner's attorneys filed a paper with the trial court giving their version of the statement of facts, including what took place at the hearing. The Commonwealth did likewise. On June 3, 1982, the trial judge signed a statement of facts which included the fact that at oral argument petitioner's attorneys had proffered that the defense attorneys had not consulted any psychiatrist other than Dr. Bransfield and that the defense attorneys had not adequately researched capital murder statutes in other jurisdictions regarding the definition and application of the mitigating factors set forth in Virginia Code § 19.2-264.4B. This latter finding, however, does not concern us here in view of the course the trial and this appeal have taken. The Virginia Supreme Court denied a petition for appeal from the trial court's dismissal of the habeas corpus petition on January 11, 1983. In that order it relied on *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), and *Marzullo*, supra. The Supreme Court of the United States denied certiorari. — U.S. —, 103 S.Ct. 2465, 77 L.Ed.2d 1341 (1983).

Next, Turner applied for federal habeas corpus relief in the district court in the Eastern District of Virginia in the case at hand. In his petition, the allegations quoted above from the petition in the state court were copied *in haec verba*. That petition was likewise dismissed. The first time that any mention was ever made in this case of any missing witness with respect to the sentencing phase of the case, or failure to consult another psychiatrist, or any other failure with respect to the treatment of the psychiatric evidence, was when a motion was made on July 2, 1984 to alter or amend the judgment of the district court. At that time it was claimed that the defense attorneys should have called Turner's younger sister, his uncle, and two people who would say that they were willing to back Turner in opening a barber shop after release from prison. Also, Turner then filed his affidavit seeking to explain the circumstances surrounding his earlier crimes, together with some documents corroborating some good incidents in his career while imprisoned.

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland v. Washington*, — U.S. —, —, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). It is by that standard that Turner's attorneys are to be measured.

[12] So, we examine the attorneys' actions with respect to the psychiatric testimony. To begin with, they moved the court that they be permitted to employ a private psychiatrist to examine Turner. The court instead appointed a certain Dr. W.F. Daughtrey, Jr., a general practitioner, to examine and evaluate Turner and to make a report in writing to the court and to the attorneys in accordance with then effective § 19.2-169 of the Code of Virginia.

Dr. Daughtrey reported that in his opinion Turner was mentally competent to stand trial. Being of opinion, however, that more extensive examination, evaluation and observation was desirable, the court then committed Turner to Central State Hospital, a mental hospital, for additional examination, evaluation and observation. The hospital was ordered to report to the court and to the attorneys, which it did. While there, Turner underwent psychiatric, psychological and sociological evaluation by the staff. The report from Central State Hospital was that Turner suffered from personality disorders and anti-social personality, each mild. It recommended that he be returned to the court for disposition of the pending charges. Turner's attorneys persisted, however, that Turner needed further examination, and the court ordered that the attorneys be permitted to employ Dr. Bransfield.[6] Dr. Bransfield, after examination of Turner and after psychological testing by Dr. Erwin F. Sacks, PhD and one of Dr. Bransfield's associates, submitted a long and detailed report to the effect that Turner was competent to stand trial. While Dr. Bransfield did not feel that Turner had schizophrenia, he was of opinion that a few psychiatrists would diagnose Turner as having latent schizophrenia. He also was of opinion that Turner in times of stress might display paranoid tendencies but that Turner had not shown a paranoid psychosis. He also thought that Turner had an anti-social personality and was not under an irresistible impulse at the time of the murder.

At the sentencing phase, Turner called one of the psychiatrists who had examined him, Dr. Bransfield, as well as his mother, his cousin and his aunt. He also called Officer Bain and the police chief. The officers were obviously called to prove that Turner was placed in a position of stress upon finding out that the silent alarm had been set off and upon the appearance of Officer Bain. The family witnesses, of course, had good things to say about Turner, how he was good to his family and had had a very disadvantaged childhood. His mother also testified, in corroboration of Dr. Bransfield, that at or about the time of the shooting she had had to call the local police about an incident at home and that she had told the police that Turner needed treatment for his mind. She said that he had been in a daze and that she was afraid that he might hurt somebody if they would push him. Dr. Bransfield had testified that if Turner believed he was cornered he might react in a violent way and he felt that if Turner had had treatment at the time of the shooting that Smith would not have been killed.

Dr. Bransfield, all in all, was quite a good witness for Turner. The gist of his testimony is contained in one of his answers on cross-examination:

> "He had psychotic symptoms which were present for at least three weeks before July 12th [the day of the murder]. I could list what those symptoms are. They seemed to influence his behavior. I could not prove—there was no evidence that I could show that his shooting Mr. Smith was fully and completely a psychotic act; however, I do feel that he was affected by psychotic problems which impaired his ability to perform in a rational manner and the symptoms that he had, I could list."

Earlier, the conclusion of Dr. Bransfield's direct examination was as follows:

> Q ... [D]o you have an opinion with reasonable medical certainty as to whether this crime was committed while Willie Turner was under the influence of extreme mental or emotional disturbance?
>
> A Yes, I do have an opinion.
>
> Q And what is that opinion, sir?

6. We note that the orders for the various psychiatric examinations of Turner were entered by the General District Court before Turner was indicted. In Virginia, the General District Court in the usual course of things has jurisdiction to ascertain probable cause and decide whether a defendant will be bound to a grand jury. Circuit Courts are the trial courts of general jurisdiction.

A That I feel he was under the influence of mental disturbance while he was committing the crime.

Thus, Dr. Bransfield's testimony tended to show one of the facts which may tend to show mitigation specifically mentioned in the Virginia statute, "the influence of extreme mental or emotional disturbance," and also touched upon another like statutory factor, "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." See Va.Code § 19.2-264.4. In view of Dr. Bransfield's testimony, it is seen that the contention in both petitions for habeas corpus, that the attorneys "failed to develop and present adequately the psychiatric evidence sufficient to support a finding of the presence of mitigating mental abnormalities," is little better than frivolous. The evidence was there for the jury to consider. The jury simply chose not to found its verdict upon that mitigating circumstance.

The claim now made on appeal is that Turner's attorneys "mishandl[ed]" "the psychiatric testimony and mitigating evidence" which was "essentially a product of ignorance." The claim goes that the attorneys "did not know the diagnostic implications or the potential dangers from cross examination of a diagnosis of anti-social personality;" they "had not discussed with Dr. Bransfield the definitions of the mitigating and aggravating circumstances on which he would be expected to comment;" and "did not acquire the degree of expertise in psychiatric matters necessary to fully develop the psychiatric defense."

The record belies the charges. The attorneys had caused three examinations of Turner, the preliminary examination by a general practitioner and two by psychiatric experts. While we are not told what are the diagnostic implications or potential dangers from cross examination of a diagnosis of an anti-social personality, the attorneys were obviously prepared to have more than one psychiatrist testify, for they so advised the court in the record. Dr. Bransfield's testimony was as good as it could have been. We think Turner's attorneys, in handling the psychiatric defense, did a professional job in every sense of the word. They had a good witness who testified as favorably in Turner's behalf as could have been wanted. Their examination of the witness was conducted in a skillful and knowledgeable manner. We are thus of opinion that their performance in Turner's behalf was reasonable under prevailing professional norms. Turner's present reliance on other possible theories of defense are nothing more than afterthoughts, we think, brought into play after the best defense, that of direct evidence on the direct question involved, had been tried but found wanting through no fault of the attorneys. The question of Turner's state of mind and the degree of his responsibility for his acts at the time of the shooting was purely a jury question. By its verdict the jury simply found that the mitigating factors were insufficient, a matter entirely within its province. No fault of any kind can be laid to the attorneys for this result.[7]

V

Turner challenges the use of the vileness criterion in this case as being violative of his rights under the Eighth and Fourteenth Amendments to the Constitution.

Under Virginia law the death penalty may be imposed upon a defendant if the jury finds beyond a reasonable doubt that "there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society; [the dangerousness criterion] *or* that his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind or

7. With respect to the claim that the attorneys should have shopped around for another psychiatrist, we have excluded that ground in *Barfield v. Harris*, 719 F.2d 58, 63 (4th Cir.1983), affirming 540 F.Supp. 451 (E.D.N.C.1982), and we do not think the claim has any validity here.

'aggravated battery to the victim" (the vileness criterion) Va.Code § 19.2-264.4C (emphasis added).

The Virginia Supreme Court has construed the vileness component of § 19.2-264.4C to include three separate and distinct features, those being torture, depravity of mind or aggravated battery. Proof of only one of these factors is sufficient to support a sentence of death. *Bunch v. Commonwealth*, 225 Va. 423, 432, 304 S.E.2d 271 (1983). Even more importantly, the Virginia Court has also given a limiting construction to two components of the vileness criterion. Depravity of mind has been construed to mean "a degree of moral turpitude and physical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." Aggravated battery is "a battery which qualitatively and quantitatively is more culpable than the minimum necessary to accomplish an act of murder." *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135, 149 (1978).

[12] The jury here was given a verdict form setting out both statutory aggravating factors (dangerousness and vileness) connected by the conjunctive "and/or". The jury unanimously imposed a sentence of death,[8] returning the verdict form without striking either the "and" or the "or".[9] Thus, this case differs from *Briley v. Bass*, 742 F.2d 155 (4th Cir.1984), where the jury struck the word "or" and unanimously found both aggravating factors. There, the court did not need to consider a similar constitutional attack on the vileness criterion of § 19.2-264.4C because the dangerousness criterion was sufficient. *Briley* at pp. 165–166. Because we cannot be sure which factor the jury relied upon in awarding the death sentence in this case, we consider Turner's attacks on the vileness criterion.[10]

[14] Turner does not attack the constitutionality of this aggravating factor on its face, as that issue has been disposed of in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Instead, he attacks its constitutionality as applied to him, relying upon *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion).

In *Godfrey* the Supreme Court reversed the imposition of the death penalty in a capital murder case because the Georgia vileness criterion was unconstitutionally applied to the defendant. Godfrey had been having marital problems with his wife of 28 years. He had a history of a drinking problem and violent behavior toward his wife. Godfrey's wife had left him and had filed suit for divorce. His attempts at reconciliation were rebuffed. Mrs. Godfrey moved in with her mother, who Godfrey felt encouraged the separation.

One evening immediately after arguing with his wife over the telephone, Godfrey took his shotgun and walked a short way to his mother-in-law's home. He peered through the window and saw his wife, his 11 year old daughter, and his mother-in-law. He immediately shot his wife in the forehead, killing her instantly. He then entered the trailer and struck and injured his daughter. He then fired one shot at his

8. The jury verdict read as follows:

"We, the Jury, on the issue joined, having found the defendant guilty of Capital Murder of W. Jack Smith, Jr., as charged in the Indictment, and having found that,

after consideration of his past criminal record that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society,

and/or

his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind; aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder,

and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death."

9. We agree with the Virginia Supreme Court that the better practice would be for the trial court to poll the jury as to which aggravating factor they found. *Turner*, supra, 273 S.E.2d at 45 n. 12.

10. Turner does not challenge the dangerousness criterion. There is ample evidence in the record to support such a verdict. *Turner*, supra, 273 S.E.2d at 44 n. 11 and 273 S.E.2d at 45.

mother-in-law, hitting her in the head and killing her instantly. Godfrey immediately called the police, surrendered and confessed to the murders. 446 U.S. 424–426, 100 S.Ct. 1763–1764.

Godfrey was found guilty of two counts of murder and one count of aggravated assault. He was sentenced to death under Georgia's statute providing as aggravating circumstances that the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." [11] At the sentencing stage of trial, the prosecutor conceded that the case did not involve torture or aggravated battery. The jury found that "the offense of murder was outrageously or wantonly vile, horrible or inhuman." The Georgia Supreme Court affirmed the imposition of the death penalty.

The Supreme Court reversed. The Court first noted that a State's sentencing scheme must provide "a meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Id. at 427, 100 S.Ct. at 1764, quoting *Furman v. Georgia*, 408 U.S. 238, 313, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 (White, J. concurring). The sentencer must be given clear and objective standards to follow in the application of the death penalty. Those "specific and detailed" guidelines enable the courts to rationally review the sentence imposed.

The Court found no such guidance present in *Godfrey*. Nothing in the words "outrageously or wantonly vile, horrible or inhuman" alone distinguished this murder from others not eligible for the death penalty. The Court reached this conclusion after reviewing Georgia case law giving the phrase a limited construction that required a demonstration that the offense involved torture, depravity of mind or aggravated battery. Depravity of mind had been defined in Georgia to mean the state of mind leading to torture or aggravated battery. But in Godfrey's case the prosecution had conceded that no torture or aggravated battery was present. Thus, the murders did not fit within the limiting criteria set out by the Georgia Supreme Court.

The Court held in *Godfrey* that the phrase "outrageously or wantonly vile, horrible or inhuman" in and of itself had not been given a constitutional construction by the Georgia Supreme Court. The Court concluded that "[t]he petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder. His victims were killed instantaneously. They were members of his family who were causing him extreme emotional trauma. Shortly after the killings, he acknowledged his responsibility and the heinous nature of his crimes." Id. 446 U.S. at 433, 100 S.Ct. at 1767.

On direct appeal, the Virginia Supreme Court rejected Turner's argument that *Godfrey* required reversal of his death sentence. It construed the statute to require not only outrageously or wantonly vile, horrible or inhuman conduct, but also that such conduct involve either torture, an aggravated battery of the victim, or the perpetrator's depravity of mind. The Court then found, applying its limiting precedent of *Smith v. Commonwealth*, that the evidence established an aggravated battery which is a " 'battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish the act of murder.' " 248 S.E.2d at 149; 273 S.E.2d at 45. The court then found that, in all events, the dangerousness criterion of the statute had been met. Turner had been convicted previously of malicious maiming, escape, unlawful wounding, malicious wounding, and second degree murder, four of the offenses occurring while he was in prison. The validity of this finding is not questioned on appeal.

We agree with the analysis by the Virginia Supreme Court. The fatal weakness in *Godfrey* was the unconstitutionally broad construction given the vileness criterion in the absence of both torture and

11. This language is identical to that of Va.Code § 19.2-264.4C.

aggravated battery by the Georgia Supreme Court. That weakness is not present here. The Virginia Supreme Court has given a limited construction to the vileness criterion and applied that limited construction here.

We also note that the facts of this case are not even similar facts to those upon which the Supreme Court relied in *Godfrey*. In contrast, the murder here was cold-blooded and calculated, involving no element of emotional trauma as was present in *Godfrey*. Turner initially shot Smith for no reason at all. While Smith lay alive but helpless and while Officer Bain pleaded, Turner fired two shots into Smith's chest after stating that he was going to kill him for snitching on him. No comparison can be drawn between the facts of *Godfrey* and the deliberate malicious murder presented in this case. We reject Turner's contention that his crime was not so vile as to justify the imposition of death. The case fits within the constitutionally limited construction of the vileness criterion established by the Virginia Supreme Court, and we are of opinion Virginia's death penalty provisions were constitutionally applied.

[15] On a related subject, we find no constitutional deficiency in the instructions given to the jury at the sentencing stage of the trial. The instructions set out the appropriate mitigating factors of § 19.2-264.4, and the jury was also instructed as to the limiting definition of aggravated battery as expressed in *Smith*. The trial judge carefully instructed the jury that "[w]here the evidence is susceptible to two interpretations, one consistent with the imposition of the death penalty, and the other with the imposition of life imprisonment, you should not adopt that interpretation which is consistent with imposition of the death penalty." We do not think that *Godfrey* requires that a jury be instructed on each term in the aggravating circumstances. We see no reason why this jury should not have understood the terms of the instructions given. *Cape v. Francis*, 741 F.2d 1287 (11th Cir.1984).

The constitutional flaw of *Godfrey*, the Georgia Court's failure to give a constitutional construction to the vileness criterion, is not present here. The Virginia Court has limited the breadth of the criterion in such a manner that its application here was neither arbitrary nor capricious.[12] The jury was properly instructed. Nothing else was constitutionally required.

VI

[16] While deliberating on the sentence to be imposed, the jury returned and asked the judge what life imprisonment entailed. The judge responded that the jury must consider only the two alternatives set out in the instructions, those being death or life imprisonment.

Turner contends that the due process requires that the jury be instructed that a prisoner may be entitled to parole and that the parole board is permitted to grant parole only after finding that the prisoner's release will serve his interests and the interests of society.

It is settled that such an instruction is not permissible under Virginia law. *Clark v. Commonwealth*, supra; *Hinton v. Commonwealth*, 219 Va. 492, 247 S.E.2d 704 (1978).

In *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), the Court upheld as constitutional a California law requiring that a jury in a capital case be instructed of the governor's power to commute a sentence of life without the

12. The Virginia Supreme Court has consistently applied the limiting provisions of *Smith v. Commonwealth*, supra, in its review of cases involving the death penalty. *Stockton v. Commonwealth*, 227 Va. 124, 314 S.E.2d 371 (1984) (aggravated battery and depravity of mind); *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271 (1983) (aggravated battery and depravity of mind); *Whitley v. Commonwealth*, 223 Va. 66, 286 S.E.2d 162 (1982) (aggravated battery); *(James) Briley v. Commonwealth*, 221 Va. 563, 273 S.E.2d 57 (1980) (aggravated battery and depravity of mind); *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979) (depravity of mind).

possibility of parole. The Court made clear that while such disclosure is constitutionally permissible it is not constitutionally required. It also upheld the failure or refusal of the trial court to instruct the jury on the governor's power to commute a death sentence. In arriving at its decision, the Court noted: "[o]ur conclusion is not intended to override the contrary judgment of state legislatures that capital sentencing juries in their state should not be permitted to consider the governor's power to commute a sentence." In footnote 30 the Court stated that "[m]any state courts have held it improper for the jury to consider or to be informed—through argument or instruction—of the possibility of commutation, pardon or parole." Id. at ——, 103 S.Ct. at 3459. While not exactly on point, we think *Ramos* indicates that the Court would decide that while it is constitutionally permissible to instruct the jury on the subject of parole, such an instruction is not constitutionally required. We so hold. Accord *O'Bryan v. Estelle*, 714 F.2d 365, esp. 389 (5th Cir.1983).

We have considered each of the issues raised by Turner in his appeal and find that he had a constitutionally fair trial.

Our stay of the state court's order to impose its sentence is hereby dissolved.

The judgment of the district court is AFFIRMED.

JAMES DICKSON PHILLIPS, Circuit Judge, specially concurring:

I concur in the judgment and in all of the opinion except that part dealing with the claim of due process denial in refusing to question prospective jurors about the possibility of racial bias. On that point I believe the majority opinion puts too restrictive a reading on the circumstances that may entitle a criminal defendant, as a matter of due process, to have prospective jurors so questioned. But because I further believe that the circumstances giving rise to the right were not demonstrated here under a proper application of the principle, I concur in the court's conclusion that no due process denial was established.

As I read *Rosales-Lopez v. United States*, 451 U.S. 182, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981); *Ristaino v. Ross*, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976); and *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973), in conjunction, they yield the following principles.

The fact alone that defendant is of a different race than the crime victim is not a circumstance giving rise to the due process right, *Ristaino*, 424 U.S. at 596, 597, 96 S.Ct. at 1021, 1022; nor is this altered by the nature of the crime charged or the punishment possible, *see Ristaino*, 424 U.S. at 596 n. 8, 96 S.Ct. at 1021 n. 8 (generally rejecting *per se* approach based upon non-case-specific factors such as violent nature of crime). But special circumstances giving rise to the right may be present in a case in which racial issues are "inextricably bound up with the conduct of the trial." *Id.* at 597, 96 S.Ct. at 1021 (so interpreting basis of right recognized in *Ham* where racial prejudice against defendant was raised as defense on the merits). And, aside from specific trial issues, "more substantial indications [than race differences alone] of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case" may trigger the right. *Rosales-Lopez*, 451 U.S. at 190, 101 S.Ct. at 1635 (dicta: constitutional test stated in applying broader supervisory rule for federal courts); *see also Ristaino*, 424 U.S. at 598, 96 S.Ct. at 1022 (constitutional right might arise not only from specific trial issues but from "racial factors ... of comparable significance").

But as I read the majority opinion, it reads these decisions more restrictively in holding that only "special circumstances in the facts surrounding a particular trial" invoke the constitutional right, and that "the fact that a larger percentage of white victims' assailants are executed" may not be such a special circumstance. If by this the majority is saying that only when *Ham*-type racial issues are bound up in the merits of a criminal trial can the due pro-

...opez v. United ...11 S.Ct. 1629, 68 ...ino v. Ross, 424 ... 47 L.Ed.2d 258 ...th Carolina, 409 ...L.Ed.2d 46 (1973), ...ld the following

...efendant is of a ...me victim is not a ...o the due process ... at 596, 597, 96 ...s this altered by ... charged or the ...'istaino, 424 U.S. ...11 n. 8 (generally ... based upon non- ...as violent nature ...rcumstances giv- ...be present in a ...are "inextricably ...ct of the trial." ... (so interpreting ... in *Ham* where ... defendant was ... merits). And, ...tues, "more sub- ...race differences ... racial or ethnic ...ors in a particu- ...right. *Rosales-* ...11 S.Ct. at 1635 ...stated in apply- ...ule for federal ... 424 U.S. at 598, ...nal right might ... trial issues but ... comparable sig-

...rity opinion, it ... restrictively in ...rcumstances in ...'articular trial" ...right, and that ...entage of white ...uted" may not ...nce. If by this ...nly when *Ham-* ...nd up in the ...n the due pro-

cess right arise, I cannot agree. Obviously, if this were correct, it would follow that factors related solely to likely juror attitudes independent of specific issues in a particular case—including statistical demonstrations of jury propensities—would always be irrelevant.

But, as indicated, I do not read the authoritative Supreme Court decisions to limit the right to *Ham*-type situations. I believe that not only specific racial issues in the particular case but a demonstrated likelihood of racial prejudice affecting the "particular" jury, irrespective of specific issues, may invoke the constitutional right. And I would not be prepared flatly to rule out as possible means, among others, of demonstrating such a likelihood scientifically sound statistical evidence related to community attitudes as reflected in jury performance in sufficient samples of comparable cases.

But to demonstrate that such a propensity was sufficiently likely to afflict the "particular" jury in a given case, I think the evidence offered—whatever its source and content—would have to be much more focussed in time and geographical terms upon the very community from which the particular jury venire is drawn than was the evidence here advanced by Turner. That evidence consisted only of the following:

(1) A study by Bowers and Pierce of post-*Furman v. Georgia* data collected through December 1977 from Georgia, Florida, Texas, Alabama and Ohio, which revealed that 14.59% of blacks killing whites received the death penalty, compared to 2.66% of whites killing whites, 3.54% of blacks killing blacks, and 0.50% of whites killing blacks;

(2) a 1983 study by Gross and Mauro of data through 1980 from Oklahoma, North Carolina, Mississippi, Virginia and Arkansas. The Virginia data focused on 19 cases out of 1389 criminal homicides, these cases being chosen to control for attitudes about the degree of atrocity involved in the homicide. The statistical analysis of Virginia data showed 8.2% of blacks killing whites receiving the death sentence compared to 1.3% of the whites killing whites and 0.60% of blacks killing blacks. No white had received the death penalty for killing a black under Virginia's 1977 capital punishment statute.

This evidence, whatever its general statistical reliability as a measure of community attitudes over the wide expanses of area and time covered, is simply too diffused in its depiction of likely community, hence juror, attitudes in this particular case to invoke the right. But I am not prepared to hold, as I think the majority opinion implies, that the requisite likelihood, hence the due process right, can never be shown by statistically sound evidence of particular community attitudes as reflected in sufficiently contemporary jury verdicts in comparable situations.

UNITED STATES of America, Appellee,

v.

David Thomas HAWKES, Appellant.

UNITED STATES of America, Appellee,

v.

Sylvia Ines HAWKES, Appellant.

Nos. 84-5125(L), 84-5126.

United States Court of Appeals, Fourth Circuit.

Argued Nov. 2, 1984.

Decided Jan. 29, 1985.

Defendants were convicted in the United States District Court for the Southern District of West Virginia, at Bluefield, John T. Copenhaver, Jr., J., of unlawfully, knowingly and intentionally aiding and abetting each other in manufacture, growing, cultivation and possession with inten-

Supreme Court of the United States

No. 84-6646

Willie Lloyd Turner,

Petitioner,

v.

Allyn R. Sielaff, Director, Virginia Department of Corrections

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth ------- Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

May 13, 1985

EDITOR'S NOTE

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No. 84-6646

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1984

WILLIE LLOYD TURNER,

Petitioner,

v.

GARY BASS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Fourth Circuit properly relied upon established decisions of this Court to hold that a capital defendant does not have a constitutional right to specifically question veniremen as to racial prejudice.

II. Whether a petitioner who has not properly presented his Witherspoon argument in state courts and who has repeatedly admitted that the evidence incontrivertibly showed his guilt may invoke Grigsby v. Mabry, ___ F.2d ___ (8th Cir., Jan. 30, 1985).

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No. 84-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1984

WILLIE LLOYD TURNER

Petitioner,

v.

GARY BASS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The petitioner asserts that the jurisdiction of this Court is grounded upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth in the Petition for Writ of Certiorari at 1.

PRELIMINARY STATEMENT

References to the Petition for Writ of Certiorari will be designated as "Ptn. ___." References to the Appendix to this Brief in Opposition will be designated as "App. ___."

STATEMENT OF THE CASE

Petitioner was indicted by the Southampton County Grand Jury on the charges of capital murder, use of a firearm in the commission of murder, and possession of a sawed-off shotgun in the commission of robbery. Prior to trial, a change of venue was granted and the trial was held in Northampton County. On December 3-6, 1979, petitioner was tried by a jury in the Circuit

Court of Northampton County. He was found guilty on all counts and received a death sentence, a one year sentence in the penitentiary, and life sentence in the penitentiary on the respective charges of capital murder, use of a firearm in the commission of murder, and possession of a sawed-off shotgun in the commission of robbery. On February 6, 1980, the trial court conducted a sentencing hearing and sentenced petitioner in accordance with the verdict of the jury. A final judgment order was entered on February 19, 1980.

Petitioner then filed a petition for a writ of error in the Supreme Court of Virginia. In a published opinion, the State Supreme Court affirmed the judgment in all respects. See Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980). A petition for rehearing was denied on January 16, 1981. Thereafter the United States Supreme Court denied certiorari. See 451 U.S. 1011 (1981).

Petitioner next filed a petition for a writ of habeas corpus in the Circuit Court of Southampton County on September 9, 1981. After respondent filed a Motion to Dismiss, a hearing on this Motion was held in the circuit court on November 10, 1981. On January 4, 1982, the circuit court issued a letter opinion stating that respondent's Motion to Dismiss was being sustained. On February 10, 1982, a final order was entered dismissing the petition for a writ of habeas corpus.

This order was subsequently appealed to the State Supreme Court. By order of January 11, 1983, the Supreme Court dismissed the appeal. (Record No. 820828). On June 6, 1983, the United States Supreme Court denied certiorari. 462 U.S. 1112.

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia at Norfolk. Turner v. Bass, Civil Action No. 83-501-N. An oral argument was conducted in the district court on March 26, 1984, to consider respondent's Motion to Dismiss. By order of May 23, 1984, the district court denied in full the habeas corpus petition. Petitioner thereafter filed a motion to

alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. On July 19, 1984, this motion was denied.

After petitioner noted an appeal to the Fourth Circuit Court of Appeals, that Court stayed petitioner's execution until further order. On appeal, petitioner substantially raised each of the present contentions. On January 25, 1985, the Fourth Circuit rejected these as well as petitioner's other claims and affirmed the district court's denial of the habeas petition. See Turner v. Bass, 753 F.2d 342 (4th Cir. 1985). The Court also dissolved its previous stay. On March 4, 1985, the Fourth Circuit stayed the issuance of its mandate until March 17, 1985. On March 18, 1985, the circuit court issued the mandate. Petitioner's execution is currently scheduled for May 2, 1985; no stay of execution exists.

STATEMENT OF FACTS

As recited by the Supreme Court of Virginia in its written opinion, the facts in this case are that on July 12, 1978, petitioner entered Smith Jewelers located in Franklin, Virginia at about 11:20 A.M. Using a sawed-off shotgun, petitioner silently motioned the various customers and employees to line up against the counter of one side of the store and then forced the proprietor, W. Jack Smith, Jr., to stuff money from the cash register into some jewelry bags. While doing so, Smith was able to activate a silent alarm. Subsequently, a local police officer, A. D. Bain, Jr., came in and inquired as to why the alarm was on. Petitioner then forced Bain to give up his revolver to him and put it in his pocket while continuing to hold the shotgun in his right hand. Petitioner made the store owner turn the alarm off and fill up some more jewelry bags with store merchandise.

Petitioner then took the pistol from his pocket and put it in his right hand, switching the shotgun to his left hand. As he tossed the pistol, it discharged and a shot went towards the back

of the store. After Bain assured petitioner that no one was coming in the back, petitioner went to the middle of the room, "just looked at Mr. Smith and fired the [pistol] at" him, causing him to "yell like a puppy and [fall] to the floor...." As Smith slumped down behind the counter he began bleeding from a head wound. Medical testimony established that this first shot to Smith, while not the cause of his death, did produce injuries to his head and brain. Bain testified that petitioner had fired the shot at Smith from a distance of twelve to fifteen feet and had "just pointed right at [him] and fired" without warning.

At this point, Bain attempted to reason with petitioner and promised to take him out of town if he would not shoot anyone else. Petitioner, however, responded by saying: "I'm going to kill that nigger for snitching on me." As Smith lay helpless and "gurgling" on the floor behind the counter, petitioner approached him, looked down at him, and shot him two times in the chest in a "rapid fire" manner. These last shots, which hit Smith in the chest, caused him to jump; he did not move after that. Petitioner was not "nervous" or "shaking" but rather looked right over the counter as he shot Smith. Medical testimony demonstrated that each of these latter two shots would have been independently fatal. Subsequently, Bain was able to knock the firearms away from petitioner and subdue him until other police officers arrived on the scene.

On December 4, 1979, the petitioner was convicted by a jury of, inter alia, capital murder in the commission of a robbery in violation of § 18.2-31(d) of the Code of Virginia. At the penalty stage, evidence was introduced setting forth petitioner's extensive criminal record. Petitioner introduced testimony from the Chief of Police for the City of Franklin and from Bain relating to police procedures to be used in responding to silent alarms. On cross-examination, Bain stated that petitioner did not appear nervous while the robbery was in progress. Furthermore, there was a time lapse between the first shot wounding Smith and the last two fired from over the counter.

Thereafter, the jury recommended a sentence of death on December 6, 1979. The trial court then ordered a post-sentence report to be prepared and on February 6, 1980, it affirmed the jury's recommendation, finding that the sentence was appropriate.

REASONS FOR DENYING THE WRIT

I.

Petitioner's Argument That He Should Have Been Permitted To Specifically Question The Veniremen As To Their Possible Racial Prejudice Is Groundless Under Established Decisions Of This Court. Moreover, This Claim In Large Measure Has Been Procedurally Waived Due To Petitioner's Failure To Present Substantial Portions Of It On The State Level.

At trial, petitioner requested to have the prospective jurors specifically questioned as to whether the fact that the decedent was Caucasian and petitioner black would affect their fitness to serve. The trial court declined to ask this question. It did, however, ask a series of general questions focusing upon possible prejudices the jurors might have. See App. 1-4. Also, this case was tried only after there had been a change of venue to a non-contiguous jurisdiction.

Petitioner now relies upon a variety of historical, sociological, and statistical sources for his argument that he had a constitutional right in this case to have this question put to the veniremen. Respondent states, however, that this issue is not an appropriate ground for the granting of certiorari because the law in this area is settled. Furthermore, even if this Court wished to take a second look at the issue raised by petitioner, this case would not be an appropriate vehicle for such a review in light of petitioner's failure to present much of the present argument to any State court.

It is axiomatic that a trial judge on voir dire is "not required to put [a] question in any particular form, or to ask any particular number of questions on [a] subject simply because requested to do so by" a defendant. Ham v. South Carolina, 409 U.S. 524 (1973). Thus, in the absence of facts such as those

found in Ham (where a well-known civil rights activist claimed that the authorities were out to "get" him), a more generalized inquiry regarding bias is permissible. The two decisions of this Court subsequent to Ham, Ristaino v. Ross, 424 U.S. 589 (1976) and Rosales-Lopez v. United States, 451 U.S. 182 (1981), demonstrate that no constitutional right of petitioner's was violated in the case at bar. This Court in Ristaino stated that unless special circumstances comparable to those in Ham are present, there is no constitutional right "in a criminal trial between persons of different races or different ethnic origins" to conduct such an inquiry. 424 U.S. at 590. (emphasis added). Significantly, this Court rejected the defendant's "sweeping per se rule" that would constitutionally mandate such questioning in any case involving a crime of violence. Id. at 596 n.8.

There was not the slightest indication in Ristaino that the nature of the penalty could ever constitute such a special circumstance as was found in Ham. Logically, there is no reason to differentiate between capital and non-capital cases in the manner suggested by petitioner. This Court in Ristaino clearly held that in most criminal cases, a generalized inquiry into bias is sufficient to bring out the fact of such a predisposition. Petitioner has pointed to nothing in this case indicating that this conclusion is not equally applicable here. Nor has he pointed to any language whatever in Ristaino that would support his contention that that decision is not applicable to cases in which the jury determines the sentence.

The only subsequent case of significance is Rosales-Lopez v. United States. There, the Court in reaffirming Ristaino held that the Mexican defendant had no constitutional right to have the veniremen questioned as to possible racial or ethnic prejudice. This ruling was reached despite the acknowledgment that it "remains an unfortunate fact in our society that violent crimes perpetrated against members of other racial or ethnic

groups often raise" the possibility of racial prejudice influencing the jury. 451 U.S. at 192.

A review of the Fourth Circuit's decision in this case demonstrates that it correctly applied these decisions to reject petitioner's present claim. 753 F.2d at 344-46. Petitioner has not cited one case in the present petition which would raise the slightest question as to the correctness of the Fourth Circuit's ruling. As petitioner himself acknowledges, statistical claims somewhat comparable to his have consistently been rejected on the merits by federal courts. Ptn. at p.9. Petitioner can only point to McCleskey v. Zant, 753 F.2d 877 (11th Cir. 1985) in "support" of his argument. McCleskey, however, was decided adversely to the defendant in that case. To date, certiorari has not been granted in McCleskey. Accordingly, respondent submits that this decision hardly provides justification for a granting of certiorari in the instant case.

Moreover, even if this Court were inclined to re-examine its holdings in Ristaino and Rosales-Lopez, the present case is an inappropriate foundation for doing so. It is axiomatic that this Court will not decide federal constitutional questions raised for the first time in a petition for a writ of certiorari. See Cardinale v. Louisiana, 394 U.S. 437 (1969). Cf. Anderson v. Harless, 459 U.S. 4 (1982) (substance of federal habeas corpus claim must be presented to state courts, rather than somewhat similar state-law claims). Both on trial and on direct appeal to the Supreme Court of Virginia, the only study cited by petitioner on the present issue was the Northeastern University study by Bowers and Pierce. This study contained no statistics whatever as to any practices in Virginia. In ruling against petitioner on this issue the Supreme Court of Virginia noted that the study had been based upon statistics compiled in other states "and thus was of little utility in establishing the potential of prejudice in Virginia." 221 Va. at 523 n.9.

As petitioner acknowledges, the next time that he cited any other statistical studies in support of the present contention

was in a motion in the federal district court to alter or amend the judgment. This motion was based in part upon the 1983 study by Professors Gross and Mauro. Ptn. at p. 9 n.4. In this motion, petitioner explicitly acknowledged that this study was significantly flawed, at least as it related to the application of the death penalty in Virginia. See App. 5-6. In another pleading in the federal district court, petitioner made a similar concession regarding the Bowers and Pierce study. See App. 7-8. Likewise, in the present petition, petitioner acknowledges that Gross and Mauro could not label their own study as statistically significant. Ptn. at p.13.

Accordingly, because petitioner presented only one study to the State courts, which shed virtually no light whatever as to the application of the death penalty in Virginia, and because this and the only other study advanced in the federal district court were conceded by petitioner to be fundamentally flawed, he is not situated to seek certiorari on this issue. To the extent that petitioner relies upon any other studies, respondent submits that he has effectively tried to expand the record on appeal. In any event, particularly in view of petitioner's admission in the Fourth Circuit that there was nothing in the facts of this particular case suggestive of racial antagonism, 753 F.2d at 346, Ristaino and Rosales-Lopez were properly relied upon by the State and federal courts to reject the present proposition.

II.

Petitioner May Not Properly Rely Upon Grigsby v. Mabry, ___ F.2d ___ (8th Cir., Jan. 30, 1985), In View Of His Failure To Properly Raise It On The State Level And His Explicit Admission In Various State Pleadings That The Evidence Established Without Question His Guilt.

In his petition, Turner contends that this Court may grant certiorari in Grigsby v. Mabry, supra, and because that case may potentially afford him relief, at the very least the present case should be stayed pending a resolution of Grigsby. Respondent, however, states that petitioner is not properly able to rely upon

Grigsby due to his failure to present this claim on the state level and, further, his waiver of any challenge to his guilt or the impartiality of the jury in the guilt phase.

First, the present claim is of course highly speculative. Certiorari has not been granted in Grigsby; a petition has not even been filed. Significantly, this Court has denied certiorari in several other cases in which Grigsby had been invoked. See, e.g., Wainwright v. Witt, ___ U.S. ___, 53 U.S.L.W. 3647 (Mar. 5, 1985); Rector v. Arkansas, ___ U.S. ___, 80 L.Ed.2d 842 (1984). In Rector, the joint request of the defendant and the state to grant certiorari was denied.

Respondent submits that this case is no different from Witt and Rector. It is important to note the precise nature of the arguments advanced in Grigsby and the limited nature of its holding. Three related but distinct prongs underlie the statistically--based argument accepted in Grigsby that the application of Witherspoon v. Illinois, 391 U.S. 510 (1968) unconstitutionally deprives a capital murder defendant of his right to a fair and impartial jury. It is first asserted that the very process of conducting the voir dire under Witherspoon tends to have a psychological impact upon the qualified juror which works to the detriment of the defendant. See, e.g., Grigsby v. Mabry, 569 F. Supp. 1273, 1303-04 (E.D. Ark. 1983); Hovey v. Superior Court, 28 Cal.3d 1, 616 P.2d 1301, 168 Cal. Rep. 128, 174-78 (1980). The second contention is that a capital defendant's right to a jury that reflects a fair cross-section of the community, see generally Taylor v. Louisiana, 419 U.S. 522 (1975), is violated by the exclusion of jurors absolutely opposed to imposition of the death penalty. Finally, opponents of Witherspoon claim that the removal of veniremen pursuant to Witherspoon results in a jury that is overly conviction-prone.

None of these arguments, however, has the slightest reference to the penalty stage of the proceedings. The court in Grigsby carefully limited its consideration of these statistical studies to their claimed effect in the guilt phase of capital

prosecutions. It did not hold that veniremen absolutely opposed to capital punishment may properly serve in the penalty phase.

A review of the state court pleadings previously filed by petitioner demonstrates that he did not comply with Rule 5:21 of the Rules of the Supreme Court of Virginia, the Commonwealth's contemporaneous objection rule, or Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, sub. nom., Parrigan v. Paderick, 419 U.S. 1108 (1975), which bars habeas review of a new claim that could have been raised at trial or on appeal. Thus, he may not now invoke Grigsby. See Cardinale v. Louisiana, supra; Anderson v. Harless, supra.

At trial, petitioner raised none of the present arguments. He cited no statistical studies whatever and merely asserted without elaboration that it was improper for the prosecution in this one kind of case to be able to ask prospective jurors "as to their feelings or their propensity to give or not to give a certain punishment." See App. 9-11. Significantly, defense counsel acknowledged: "This case has never been about guilt or innocence from beginning to end. This case has been about the decision that you are to make now. There was no question of the defendant's guilt. There are some real questions about the punishment...." See App. 12.

On appeal, petitioner repeatedly argued that various rulings of the trial court had prejudiced him in the penalty phase of the trial. Counsel stated, however, that there was "no serious question about [petitioner's] guilt. The only question throughout the proceedings was whether Willie Lloyd Turner should be put to death." See App. 13. As to Witherspoon, petitioner merely argued that a "death-qualified" jury is "preconditioned to favor the death penalty." See App. 14-15. Of the three arguments previously described that have been used to attack Witherspoon, petitioner raised only the first. The only studies cited by petitioner were in support of this proposition concerning the alleged psychological impact of Witherspoon upon

the veniremen. Such a jury was asserted to be much less reluctant "to impose the death penalty" upon a defendant.

In its written opinion affirming petitioner's conviction, the Supreme Court of Virginia stated that it rejected his contention that the trial court should not have questioned prospective jurors as to their ability "to impose capital punishment." Turner v. Commonwealth, supra, 221 Va. at 524. Subsequently, petitioner filed the first of his petitions for writs of certiorari in this Court. He stated in this petition that he was not challenging "the ability of any of the jurors to render an impartial decision as to guilt" but was contending that the responses of one venireman did not sufficiently demonstrate his absolute aversion to the death penalty. See App. 16.

Petitioner then sought habeas relief in the Circuit Court of Southampton County. In a cursory claim, he repeated his previous contention that the process of qualifying a jury under Witherspoon prejudices the defendant. See App. 17-20. Arguably, he also asserted for the first time that a Witherspoon-qualified jury is too prosecution-oriented in the guilt as well as the penalty stage of a trial. Clearly, however, he did not assert that such a jury violates a defendant's right to a fair cross-section of the community. The circuit court in any event treated this claim as simply reiterative of what had been raised on appeal and rejected by the Supreme Court of Virginia. See App. 21-22. The court implicitly indicated that any claim deemed to raise new matters was procedurally barred.

In his appeal of this dismissal to the Supreme Court of Virginia, petitioner did not attack this ruling. He did, however, repeat his previous concession that "there [could] be no serious question about the guilt of the petitioner. The only significant issue [was] the appropriate sentence." See App. 23-24. In the subsequent petition for a writ of certiorari in this Court, petitioner repeated in identical language this characterization of the case. See App. 25-26.

Respondent submits that petitioner failed to comply with Rule 5:21 and Slayton v. Parrigan, supra and has in any event explicitly waived his right to rely upon the holding in Grigsby. Rule 5:21 requires an objection to be stated with reasonable certainty at the time of the ruling. The Supreme Court of Virginia has strictly invoked the sanctions of this Rule. See, e.g., Floyd v. Commonwealth, 219 Va. 575, 584, 249 S.E.2d 171 (1978).

Thus, it is clear that Rule 5:21 and Slayton v. Parrigan would bar appellate or habeas review of any Grigsby claim. At trial, petitioner made no argument comparable to Grigsby. On appeal, the Supreme Court of Virginia clearly understood his argument to challenge Witherspoon only as it related to the penalty phase of the trial. On state habeas, petitioner's Witherspoon allegation was dismissed as repetitive by the circuit court. Petitioner waived any right to challenge the correctness of this ruling by not assigning this as error in his appeal of the habeas dismissal to the Supreme Court of Virginia.

Further, it is apparent that at no point on the state level has petitioner ever asserted that his right to a jury representing a fair cross-section of the community was violated. Yet, a cursory reading of Grigsby demonstrates that the Eighth Circuit's decision was largely premised on the conclusion that Witherspoon brought about such a violation. See Slip Op. at 4-9, 29-32.

Under all of these circumstances, respondent submits that the petitioner simply cannot derive any benefits from any future ruling by this Court in Grigsby. Even the Eighth Circuit would not apply Grigsby to the case at bar. For example, in Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985), decided one day after Grigsby, the court rejected a claim of ineffective assistance of trial counsel in not citing Grigsby due to the lack of prejudice arising from the overwhelming proof of guilt.

Similarly, the Eighth Circuit in Woodard v. Sargent, 753 F.2d 694 (8th Cir. 1985), considered the applicability of Grigsby

to a case in which the record did not clearly demonstrate whether the argument had been advanced or considered on the merits on the state level. The Court ultimately concluded that this claim had been substantively rejected by the Supreme Court of Arkansas. It did so, however, only on the basis of an Arkansas state rule which required review of issues raised for the first time on state habeas which were "fundamental" to the judgment. The circuit court concluded that Arkansas deemed the Grigsby argument to be such an issue. It is apparent from the opinion, however, that in the absence of such a provision, the Eighth Circuit would not have considered Grigsby due to the petitioner's state procedural default. Thus, applied to the case at bar, Woodard bars review of petitioner's Grigsby claim.

Respondent further asserts that petitioner cannot properly invoke Grigsby due to his repeated admission of one obvious but critical fact--namely, that the evidence proved beyond any doubt that he had committed capital murder. Several individuals in the jewelry store were eyewitnesses to the slaying of the decedent. The only serious argument advanced in the guilt stage was the purely technical defense that the asportation necessary to establish the predicate felony of robbery had not been proven. At the conclusion of the Commonwealth's case the trial court refused to grant petitioner's motion to strike the prosecution's evidence on this ground. This of course was an issue for the trial judge, rather than the jury, to resolve. The court having resolved this issue adversely to petitioner, there could be no question as to whether any jury would find him guilty of capital murder.

The only real issue in this case, as trial counsel acknowledged five and one-half years ago, was what punishment petitioner would receive. In view of petitioner's twin admissions that the evidence incontrovertibly established his guilt and that the jurors impartially determined his guilt,

respondent submits that Grigsby is insufficient to justify the granting of certiorari here.

CONCLUSION

For the foregoing reasons, respondent submits that the granting of certiorari in this case is inappropriate. Petitioner has not preserved his right to present these claims on the merits in this Court. Nor has he shown any substantial likelihood that this Court would review either of the present issues or afford him relief. Accordingly, respondent prays that this Court deny the petition for certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 1985, a copy of the foregoing Respondent's Brief in Opposition was mailed to J. Lloyd Snook, III, Esquire, Paxson, Smith, Gilliam & Scott, P. O. Box 2737, Charlottesville, Virginia 22902, counsel for petitioner.

Robert H. Anderson III

Robert H. Anderson, III
Assistant Attorney General

APPENDIX

their names slowly.

THE CLERK: I ask you all to raise your right hand.

(The jurors were sworn on voir dire.)

THE COURT: Be seated in the jury box, please.

THE CLERK: As I call your name, would you just raise your right hand. James Warren Smith, Ellen Chandler, James Smith, Jessie Moodie and J. Ashby Lecato.

(The jurors were identified.)

THE COURT: Lady and gentlemen, the case that we have here today -- the cases -- are Commonwealth of Virginia versus Willie Lloyd Turner, and the defendant, Willie Lloyd Turner, is represented by Mr. William R. Savage of Suffolk, and Mr. Thomas L. Woodward, Jr., of Suffolk. The Commonwealth of Virginia is represented by Mr. Richard C. Grizzard, Commonwealth's Attorney of Southampton County, and the defendant is charged with use of a firearm in the commission of a felony. He's charged with possession of a sawed-off shotgun in the perpetration of a robbery of Alan D. Bain. He's charged with the capital murder of -- the killing of W. Jack Smith, Jr., while in the

commission of a robbery while armed with a deadly weapon.

Now, all of these offenses are alleged to have happened on the 12th day of July, 1973, in the City of Franklin, Virginia.

Now, are any of you related by blood or marriage to any of the attorneys involved in this case, to the defendant or to Alan D. Bain or W. Jr. Smith, Jr.?

Are any of you related to any of these people?

Do any of you have any knowledge with reference to these cases?

Have you heard them discussed?

Have you read, seen or heard any news articles of the facts of this case or the charges against the defendant?

Have any of you read anything or heard anything or seen anything about these cases?

Have you heard anyone discuss this case in any way?

Have any of you formed any opinion with regard to the guilt or innocence of the defendant, Willie Lloyd Turner?

Have you or any members of your family been

a victim of any crime?

Are you related by blood or marriage to any person who is employed as a police officer or any other law enforcement officer?

Now, one of the charges, the alleged charge of murder of W. Jack Smith, Jr., is a capital case and carries the possibility of the death penalty, if convicted.

Mrs. Chandler, do you have any religious or conscientious scruples or objections against the imposition of a death sentence?

MRS. CHANDLER: Under some circumstances.

THE COURT: Could you in a proper case impose the death penalty?

MRS. CHANDLER: I think if I felt that the person --

THE COURT: Would you please just answer yes or no, please.

MRS. CHANDLER: Yes. I guess I could.

THE COURT: Then is your objection to the death penalty absolute?

MRS. CHANDLER: No.

THE COURT: Do you feel that every person convicted of the murder of another person should receive the death penalty?

THE COURT: Do you feel that in each and every case where a person is convicted of murder should receive the death penalty?

MR. LECATO: No, sir.

THE COURT: Now, do any of you know any reason whatsoever why you cannot render a fair an impartial verdict in this case?

Do any of you know any reason whatsoever w you should not serve as a member of the jury in this case?

MR. GRIZZARD: May counsel approach the bench, Your Honor?

THE COURT: Yes.

(A side-bar conference was held by the Court with counsel for both sides out of the hearing of the jurors and the court reporter.)

THE COURT: All right, Sheriff. Would you take these members of the jury panel.

(The jurors went into the jury room.)

THE COURT: All right, Mr. Grizzard.

MR. GRIZZARD: May it please the Court, Commonwealth would ask that Mrs. Chandler be brought back for further questioning. The answers she gave to the Court's voir dire are equivocal at best and confusing. I think she has not made a clear

For the purposes of an offer of proof in support of this Motion, Petitioner submits herewith a copy of the Gross and Mauro study, "Patterns of Death," as Petitioner's Exhibit One. That study was done in eight states; Georgia, Florida and Illinois are discussed at length in the body of the article (that portion of the article has not been submitted to this Court, because of its marginal relevance; that is why pages 42 through 90 are missing), while the results from Arkansas, Mississippi, North Carolina, Oklahoma and Virginia are described briefly in the text and presented in summary form in an appendix. The results from those five states, including Virginia, are summarized beginning at page 91.

Gross and Mauro caution that the statistics from Virginia, if viewed in isolation, may be suspect because the number of death sentences reviewed -- 19 -- was simply too small.

> Considered in isolation, such small numbers make any sentencing pattern hard to discern: only very strong effects can be seen clearly with so few observations. Some of the racial disparities that we report would not, on their own, constitute convincing proof of racial discrimination; this is particularly true for Arkansas and Virginia, in each of which we studied fewer than twenty death sentences. If we were examining the data from one of the states separately from the rest we would conclude that there is good reason to suspect racial discrimination in capital sentencing -- indeed, that it is more likely than not -- but that it is too early to tell for sure. But we are not considering these states in isolation, and we are not primarily interested in determining the existence of racial discrimination in any particular state.
>
> Viewed collectively, the data from these five states show a remarkably consistent pattern of racial disparities.

Pre-publication draft at 91-92. The study concluded that

> In Virginia the odds of receiving the death penalty for killing a white were 2.41 times greater than the odds of receiving the death penalty for killing a black.

Id. at 96. Because of the small sample size, this number, taken by itself and out of the context provided by the other states, is not statistically significant proof that the race of the victim has an effect on the probability of receiving the death penalty. Id. at 94. However,

> When we examined the effect of the race of the victim in models that included the race of the suspect as a variable the general picture remained essentially unchanged. In North Carolina the race-of-victim effect became smaller and statistically non-significant; in the remaining four states -- Oklahoma, Mississippi, Virginia, and Arkansas -- the effect became larger.

Id. at 96-97.

This evidence is precisely the point of our claim -- even if the data is not sufficient at this point to prove that the death penalty is being discriminatorily applied in Virginia, a contention that can only be sustained if the data from the rest of the country is ignored, it is certainly sufficient to raise a strong question about the possible impact of racial bias in the decision of a jury to impose the death sentence. Even if the data is therefore insufficient to strike down the death penalty statutes, it is clearly sufficient to support counsel's timely request for voir dire on racial prejudice in a case in which a black man is accused of killing a white man.

We ask this Court to do either or both of the following:

At trial, Petitioner introduced a study (Defendant's Exhibit 1), admittedly not based on Virginia data, showing the discriminatory manner in which the death sentence has been imposed in Georgia, Florida, Texas, Alabama and Ohio. Aggregating the data from the five states, it may be seen that the probability of receiving the death sentence for criminal homicide between the effective date of the various states' post-Furman statutes through December, 1977, is very much a function of the race of the victim and the particular offender/victim racial combinations. For example, the death sentence was imposed in 377 of 9,094 cases in which a white was killed, or 4.15% of the cases. The offender received the death sentence in 53 of 9,850 cases in which the death sentence was imposed, or .54% of the cases. In short, if someone kills a white, he is eight times more likely to receive the death sentence than if he kills a black. Similar aggregate totals may be computed for each of the offender/victim racial combinations:

	Estimated Number of Offenders	Persons Sentenced to Death	Probability of a Death Sentence
Black kills White	1,131	165	14 59%
White kills White	7,963	212	2.66%
Total -- White Victim	9,094	377	4.15%
Black kills Black	9,451	51	.54%
White kills Black	399	2	.50%
Total -- Black Victim	9,850	53	.54%
Total -- All Victims	18,944	430	2.31%

The numbers are similar if the class of cases is narrowed somewhat to include only felony-type murders.

	Estimated Number of Offenders	Persons Sentenced to Death	Probability of a Death Sentence
Black kills White	443	100	22.57%
White kills White	857	123	14.35%
Total -- White Victim	1,300	223	17.15%
Black kills Black	441	17	3.85%
White kills Black	50	2	4.00%
Total -- Black Victim	491	19	3.87%
Total -- All Victims	1,791	242	13.47%

From this very rough data, two trends may be noted. First, there appears to be a very strong likelihood that the race of the offender and the race of the victim (and, in particular, the way in which those two variables interact) will have a very large effect upon whether a particular defendant receives the death sentence. This is true across the country, as the survey from Georgia, Florida, Texas, Alabama and Ohio shows. The Virginia Supreme Court dismissed this data out of hand, as not having been related to Virginia.

With the data that we do have, we can see, in rough outline, that there is certainly a disparate impact upon blacks, and, particular, upon blacks who kill whites. Petitioner will be the first to concede that the data that he has thus far accumulated on Virginia is not subject to rigorous statistical analysis. But the data does raise a showing of disparate impact that is strong enough that this court should allow further inquiry.

At the state hearing on the habeas petition, counsel for Petitioner represented to the court that a study similar to

though, we're asking something of people which really probes their soul and that's their feeling as to the death penalty.

First of all, whether they have an automatic objection to the death penalty in any case, which is the exclusionary standard; but, in addition to that, we contend we should be allowed to inquire of them whether one believes that the death penalty should be imposed in any case where murder is the crime charged; whether it is in this case, as the indictment alleges, murder in the commission of a robbery or whether any type of murder which, of course, is an unlawful killing. If the Court would consider -- and I'm sure you have previously -- the other cases decided since the amendment of our death penalty statute -- Michael Darnell Smith. In that case, counsel -- both Commonwealth Attorney and defense counsel -- inquired of jurors and in the Supreme Court opinion, we find that Mr. Person and, I believe it was, Mr. Pugh, asked a particular juror those proposed questions which allowed the answers -- which allowed the Court subsequently to make its finding as to whether that juror should be allowed to be seated on a jury.

In all the cases, the seven which have been

voir dire and its method is within the discretion of the Court. I'm going to ask the questions on voir dire. I will place five jurors in the box and question them in panels of five with the exception of the question of the death penalty, which I will ask each individual juror. Now, are there any questions that you want the Court to specifically ask the members of the jury on voir dire?

MR. WOODWARD: Your Honor, might we except to the Court's ruling as to the method it will follow?

THE COURT: I will overrule your motion and note your exception in the record.

MR. WOODWARD: Mr. Savage has the questions which we are asking to be propounded. We would ask that Mr. Grizzard present his first since, of course, he is the moving party.

MR. GRIZZARD: Your Honor, I have previously submitted to the Court in the light of the Court's instructions the two questions of the Commonwealth that be asked on voir dire. For the record, I would submit that, Your Honor, as the questions of the Commonwealth.

THE COURT: All right, gentlemen.

MR. SAVAGE: Judge, in not one case that is

tried in the Commonwealth of Virginia we have [illegible] state, to my knowledge, whether it be civil or criminal, is any question asked of the jury as to their feelings or their propensity to give or not to give a certain punishment. In the former capital cases, whether it was murder or robbery, no question was asked of the jury whether or not they would or would not give it -- whether they would give life imprisonment; whether they would favor five or ten years or jail sentence or any other options known or unknown to a jury. In the capital murder case, however, we find the Commonwealth posing the question in which he wants to ask the jury whether or not they have any objection to the death penalty. If they answer the question he proposes to find out whether their objection is absolute, the asking of this question itself and the striking of any jurors on the basis of the answer is a denial of this defendant's right to due process, to equal protection of the law compared with other criminal cases, violation of the Fifth, Sixth and Fourteenth Amendment to the federal Constitution and, despite the fact that this matter has been ruled on by our state Supreme Court, we move that this question not be asked.

that has not been any more pleasant for us or you or anybody else. The very facts of the case, talking about death and killing, are not a happy subject for anybody. Frankly, I realize that we did you no kindness. We did you no favor by bringing this case over here to Northampton County. We brought the case over here to you this week for the life of our client.

This case has never been about guilt or innocence from beginning to end. This case has been about the decision that you are to make now. There was no question of the defendant's guilt. There is some real question about the punishment and so we present the case to you. The whole decision has been laid upon you and not you as a group. Each of you individually. You are 12 people, but your verdict must be unanimous. The Judge has said you may not vote as a group. You do not act or react by majority vote and each of you must make your own decision and carry it with you today and from today. You cannot say, "I was under the influence of the group. I was one or two or three against the rest." Each of you must stand individually. While your vote is a vote, your vote must be unanimous and if any one of you does not

> We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.

ckett v. Ohio, 438 U.S. 586, 604 (1978). The United States preme Court held that a jury must be given every chance to tence a defendant to life imprisonment rather than death, ause the risk that someone undeserving of the death penalty nt be executed is "unacceptable and incompatible with the mands of the Eighth and Fourteenth Amendments." Id. at 605.

Because the decision is so important, and the sequences so final, legislatures and appeals courts have been more careful to circumscribe and channel the jury's scretion. See, e.g., Furman, supra; Gregg, supra; Lockett, pra. Trial courts and appeals courts alike have been more licitous of the jury's role in the sentencing process -- eater attention is paid to jury selection and deliberation, for ample. This Court has very recently exhibited just that degree of solicitude in Justus v. Commonwealth, 220 Va. ___ (slip opinion, April 18, 1980), reversing a conviction because a Mrs. Swain, a prospective juror, was not sufficiently impartial, and in Johnson v. Commonwealth, 220 Va. ___ (slip opinion, June 8, 1979), reversing a conviction because the jury instructions were not sufficiently clear.

This case is entirely typical; there is no serious question about guilt. The only question throughout the proceedings was whether Willie Lloyd Turner should be put to death. Virtually all of the assignments of error presented in

procedural safeguard to help insure an impartial jury, a safeguard within the discretion of the trial court. Where it is "necessary to obtain an unbiased and unprejudiced jury," Dean, supra, at 668, it is error for the trial court to refuse a timely motion. When denial of counsel's motion presents the court and counsel with such a Hobson's choice, a defendant's constitutional rights to a jury known to be impartial are abridged. In this case the trial court abused its discretion by refusing defense counsel's repeated reasonable requests for individual voir dire.

E. The trial court erred in allowing the jury to be "death-qualified" by asking the veniremen questions about their attitudes toward the death penalty, a process which produces an unrepresentative jury and a jury that has been preconditioned to favor the death penalty.

The two proposed voir dire questions suggested by the Commonwealth both dealt with whether the juror could impose the death penalty. The juror was first asked whether he had any scruples against the imposition of the death penalty; next he was asked if those scruples were absolute so that he could never vote for the death penalty in a proper case. Defense counsel objected to the court's decision to pose those two questions to the jurors (R. 75-77), objecting on the grounds that asking the questions results in a "death-prone" jury, more likely to convict and to sentence a defendant to death than a similar group of 12 men and women who have not had the same questions asked of them. The only jurors who get on the jury are those who have already been forced to say out loud, in open court and before one another,

they could impose the death penalty. Such a jury is nstrably less reluctant than a non-death-qualified jury to ose the death penalty on the defendant. See Bronson, On the riction Proneness and Representativeness of the Death-lified Jury, 42 U.Colo.L.Rev. 1 (1970); H. Zeisel, Some Data uror Attitudes Towards Capital Punishment (1968), published he Center for Studies in Criminal Justice, University of ago Law School.

The evidence is clear from psychologists and hiatrists that a jury that has once responded that they could fact impose the death penalty is more likely to do so again their peers, and so the "death-qualifying" process confers unfair advantage over the defense in the battle for the tions of the jury. The most important psychological barrier been overcome. To allow the prosecution to ask the veniremen ether they could impose the death penalty in a proper case nied the defendant his right to a trial by a jury that has no preconceived notions or preconditions about punishment.

F. It was error for the trial court to refuse to sequester the jury during the trial, as requested by defendant.

Well aware of the adverse publicity surrounding the trial, even after the change of venue to Northampton County, defense counsel moved to have the jury sequestered. Counsel knew that there would be more adverse publicity each day because of the sensational nature of the case. Furthermore, Morris Mason,

> those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Witherspoon, supra, at 522-23, n.21 (emphasis in original). Petitioner is not challenging in this Petition the ability of any of the jurors to render an impartial decision as to guilt; the question here is whether Samuel Cypress' answer "made unmistakably clear" that he would not be willing or able to follow the trial court's instruction in determining whether to impose the death sentence.

This Court noted in Witherspoon, and again in Boulden, that the question is really whether the venireman would be able to follow the law and instructions of the court, no matter how strong his fixed opinion against capital punishment.

> [I]t is entirely possible that a person who has "a fixed opinion against" or who does not "believe in" capital punishment might nevertheless be perfectly able as a juror to abide by existing law -- to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case.

Boulden, supra, at 483-84; see also Witherspoon, supra, at 519. Compare also the facts of Lockett v. Ohio, 438 U.S. 586 (1978), with Adams v. Texas, supra; in Lockett, this Court found no fault with voir dire seeking to elicit from the veniremen a promise to follow the instructions of the court, while in Adams, this Court struck down a requirement that each venireman swear that "the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." If a court intends to exclude a venireman on the basis of his or her feelings about the death penalty, it may only do so if that venireman shows that he or she could not follow the instructions of the court.

The Witherspoon rule is based on the principle that both the prosecution and the defense are entitled to a jury of men and women who will follow the court's instructions. The proper inquiry,

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jury constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §9 of the Constitution of Virginia.

20. (IV) The trial court erred in permitting the jury to impose the death penalty based on a finding that Petitioner's conduct was "outrageously or wantonly vile, horrible or inhuman" in that Petitioner's conduct did not meet the requirements of Smith v. Commonwealth or Godfrey v. Georgia; imposition of the death penalty in this case therefore constitutes cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §9 of the Constitution of Virginia.

21. (V) The trial court erred in failing to grant Petitioner's motions, based on the extensive publicity and media coverage, for a continuance and for sequestration of the jury, in violation of Petitioner's right to a trial by a fair and impartial jury and his right to the Due Process of Law, rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 8 and 11 of the Constitution of Virginia.

22. (VI) The trial court's denial of Petitioner's counsel's timely request that they be permitted to join in voir dire of the prospective jurors violated Petitioner's rights to the effective assistance of counsel, to a trial by a fair and impartial jury, and to the due process of law, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 11 of the Constitution of Virginia.

23. (VII) The trial court's examination of the jurors on their views on the death penalty resulted in a jury that was biased against Petitioner both as to guilt and sentence, in violation of

Petitioner's right to a fair and impartial jury trial and to the due process of law, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 11 of the Constitution of Virginia.

24. (VIII) The trial court's action in disqualifying juror Samuel Cypress violated the ruling of the United States Supreme Court in Witherspoon v. Illinois, and denied your Petitioner his right to a trial by a fair and impartial jury in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §8 of the Constitution of Virginia.

25. (IX) The trial court's failure to permit individual voir dire, to allow any questioning into the racial attitudes of jurors, to probe the jurors' understanding of the presumption of innocence, reasonable doubt, and burden of proof, and to fully question jurors about their views on the death penalty deprived Petitioner of his rights to a trial by a fair and impartial jury and to due process of law under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§8 and 11 of the Constitution of Virginia.

26. (X) Because no robbery was committed, Petitioner could not be guilty of murder in the commission of a robbery; his death sentence is thus disproportionate and excessive, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §9 of the Constitution of Virginia.

27. (XI) The jury returned verdicts of "guilty" on both use of a firearm in the commission of a felony and capital murder during a robbery committed while armed with a deadly weapon, in violation of the Double Jeopardy Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, §8

violated Petitioner's rights to the effective assistance of counsel, to a trial by a fair and impartial jury, and to the due process of law, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 11 of the Constitution of Virginia.

57. Trial counsel timely requested that they be permitted to join in the voir dire of the prospective jurors; the request was based largely on Va. Code Ann. §8.01-358, but also on the Sixth and Fourteenth Amendments to the United States Constitutions. The request was denied, to which counsel noted their exceptions.

58. The court then proceeded to conduct the voir dire personally, asking some, but not all, of the questions suggested by defense counsel.

59. For reasons elaborated on in Count IX, infra, the voir dire was not adequate to ensure Petitioner a fair and impartial jury.

60. Petitioner was therefore denied his constitutional rights to the effective assistance of counsel, to a trial by a fair and impartial jury, and to the due process of law, rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§8 and 11 of the Constitution of Virginia.

VII. The trial court's examination of the jurors on their views on the death penalty resulted in a jury that was biased against Petitioner both as to guilt and sentence, in violation of Petitioner's right to a fair and impartial jury trial and to the due process of law, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 11 of the Constitution of Virginia.

61. Petitioner requested that the veniremen not be "death-qualified" -- that they not be examined as to their views on the death penalty; that request was denied, and the veniremen were

examined on the death penalty.

62. Scientific evidence shows that death-qualified juries are significantly more likely than non-death-qualified juries to impose the death penalty.

63. Scientific evidence shows that death-qualified juries are also significantly more "prosecution-prone" than non-death-qualified juries, resulting in a greater likelihood that the defendant will be convicted of a capital crime.

64. The process of death-qualifying a jury, therefore, results in a jury that is biased in favor of the prosecution both as to the guilt or innocence and as to sentence, in violation of Petitioner's rights to a trial by a fair and impartial jury and to the due process of law.

VIII. The trial court's action in disqualifying juror Samuel Cypress violated the ruling of the United States Supreme Court in Witherspoon v. Illinois, and denied your Petitioner his right to a trial by a fair and impartial jury in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §8 of the Constitution of Virginia.

65. When venireman Samuel Cypress was questioned on voir dire concerning his attitude toward the death penalty, his answers were inconclusive. He was never asked whether his objections to the death penalty were so strong as to render him incapable of abiding by existing law by following the instructions of the trial court. See Boulden v. Holman, 394 U.S. 478, 483-84 (1969).

66. The constitutional protection of a fair and impartial jury requires that only veniremen who have "made [it] unmistakably clear that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be

Commonwealth of Virginia

JAMES C. GODWIN
JUDGE
SUFFOLK, VIRGINIA 23434

BENJAMIN A. WILLIAMS, JR.
JUDGE
COURTLAND, VIRGINIA 23837

C. EVERETT BAGNELL
JUDGE
SUFFOLK, VIRGINIA 23434

Fifth Judicial Circuit

January 4, 1982

CITIES OF
SUFFOLK
FRANKLIN

COUNTIES OF
SOUTHAMPTON
ISLE OF WIGHT

Robert H. Anderson, III
Assistant Attorney General
900 Fidelity Building
830 East Main Street
Richmond, Virginia 23219

J. Lloyd Snook, III, Esquire
Attorney at Law
409 Park Street
Charlottesville, Virginia 22901

In Re: Willie Lloyd Turner v. Edward C. Morris, Superintendent

Gentlemen:

I have concluded that all of the issues raised in Willie Lloyd Turner's petition for habeas corpus, except those challenging the internal procedures of the Virginia Supreme Court, and ineffective assistance of counsel have already been decided by the Supreme Court on appeal.

As to the issue of whether or not the internal procedures of the Virginia Supreme Court are adequate for the protection of the petitioner's rights, this court has neither the authority nor the jurisdiction to decide it. This matter, if an issue at all, must be raised with the Virginia Supreme Court, not the Circuit Court. Based on the allegations in the petition, I could find nothing wrong with the procedures in any event.

Generally, a plenary hearing should be held to determine the issue of ineffective assistance of counsel but, in this instance, the focal point is on the treatment the attorneys gave the psychiatric testing and evaluation. A review of the record indicates that an independent, competent psychiatrist was allowed by the Court to evaluate Willie Lloyd Turner. The pertinent issues resulting from this testing and evaluation were raised by defense counsel. The problem with the psychiatrist's testimony was not due to ineffective assistance of counsel. Defense counsel very skillfully presented their psychiatric evidence to the Court and the jury, only to have the psychiatrist fail to hold up under vigorous cross-examination. This could not be pre-determined by defense counsel.

Having heard numerous pretrial motions, five days of actual trial, including many exceptions and motions made during and after trial, and after having reviewed the transcript, I find that the defendant, Willie Lloyd Turner, had excellent representation. His counsel were both experienced trial lawyers, competent to try the most serious criminal matters.

For the above reasons, I sustain the Motion to Dismiss the petition for a writ of habeas corpus and request the Attorney General to prepare the necessary order.

Yours very truly,

James C. Godwin

JCG:db
cc: Honorable Wayne M. Cosby, Clerk
Circuit Court of the
County of Southampton

W. R. Savage, III, Esquire
Attorney at Law

Thomas L. Woodward, Jr., Esquire
Attorney at Law

filed 1/7/81

In addition, counsel for Petitioner, at oral argument on November 10, 1981, proffered to the court that Petitioner's evidence would show that:

1. Trial counsel had not consulted with any psychiatrists or psychiatric texts in an effort to learn about the psychiatric issues involved in the case, and

2. Trial counsel had not adequately researched comparable capital murder statutes in other jurisdictions regarding the definition and application of the mitigating factors set forth in Va. Code Ann. § 19.2-264.4(B) (1977 Cum. Supp.).

Statement of Facts, p. 2.

The trial court conducted its own review of the record of the case, and, in its letter opinion, stated that it found no merit in Petitioner's claims. It is important to note that neither the Commonwealth nor the trial court contend that the allegations in the Petition are not sufficiently specific to be grounds for habeas corpus relief; the court found the allegations sufficient, but denied the Petition on the merits of the claim.

These allegations clearly involve matters not of record in the original trial. The court would find nowhere in the record anything dealing with the preparation of trial counsel on the psychiatric issues. In death penalty cases, of course, the preparation of the psychiatric issues is often the major preparation to be undertaken. That would be particularly true in a case such as this, in which there can be no serious question

about the guilt of the Petitioner. The only significant issue would then be the appropriate sentence.

Petitioner has suggested, through the Petition and through proffers to the court on November 10, 1981, some specific ways in which counsel's performance was inadequate. The facts that would substantiate those allegations are not of record.

The United States Supreme Court has often noted that matters of ineffective assistance often will not be apparent from the face of the record. On a different issue, Chief Justice Burger noted that the problem with ineffective assistance from joint representation is in what the advocate does not do. Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978). In many of the cases of ineffective assistance of counsel, the basis for the finding of ineffective assistance was the failure of counsel to investigate certain defenses. See, e.g., Brennan v. Blankenship, 472 F.Supp. 149 (W.D.Va. 1979); Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978); in these cases, the federal courts reversed convictions expressly because counsel did not adequately explore and develop psychiatric defenses.

In the instant case, of course, counsel made efforts to present evidence in mitigation, though the effort backfired badly. Dr. Bransfield's testimony consisted of the presentation of an opinion that Petitioner was suffering from "extreme mental or emotional disturbance" at the time of the offenses, without any explanation of that conclusion. On cross-examination, Dr. Bransfield's diagnosis of Petitioner was turned around, and that

sentencing hearing.

2. Counsel failed to develop and present adequately the psychiatric evidence sufficient to support a finding of the presence of mitigating mental abnormalities.

Petition for Writ of Habeas Corpus, p. 20.

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To say that trial counsel took a tactical gamble in their decision to put on Dr. Bransfield does not answer the question of ineffective assistance of counsel. The question, under federal law, is whether that tactical gamble "resulted from neglect or ignorance rather than from informed, professional deliberation. Marzullo v. Maryland, 561 F.2d 540, 544 (4th Cir.

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Office Supreme Court, U.S.
FILED
JUL 24 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-6646

In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIE LLOYD TURNER, PETITIONER

v.

ALLYN R. SIELAFF, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

J. LLOYD SNOOK, III
(Appointed by this Court)
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PETITION FOR CERTIORARI FILED APRIL 24, 1985
CERTIORARI GRANTED MAY 3, 1985

BEST AVAILABLE COPY

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COMMONWEALTH OF VIRGINIA
IN THE CIRCUIT COURT
OF SOUTHAMPTON COUNTY

#86-79

COMMONWEALTH OF VIRGINIA

vs.

WILLIE LLOYD TURNER

[Filed Jun. 17, 1985]

RELEVANT DOCKET ENTRIES

Date	Name of Paper
April 16, 1979	Indictment
July 12, 1978	Warrant of Arrest
July 24, 1978	Request for & Order Appointing Attorneys
August 11, 1978	Motion for Psychiatric Exam.
August 28, 1978	Order for Psychiatric Exam.
September 7, 1978	Doctor's Report on Exam.
September 11, 1978	Order for More Extensive Exam.
September 11, 1978	Order of Objection
October 11, 1978	Report from Doctor on Exam.
November 13, 1978	Order re: Psychiatric Exam. of Defendant
April 16, 1979	Order Affirming Appointment of Attys.
April 16, 1979	Motion for Discovery & Inspection

Date	Name of Paper
April 16, 1979	Motion for Change of Venue with Affidavits Attached
April 16, 1979	Order Granting Motion for Discovery and Inspection and Change of Venue
September 13, 1979	Order for Continuance on Motion of Attys. for Def.
October 15, 1979	Order for Continuance on Motion of Attys. for Def.
December 3, 1979	Proposed Voir Dire Questions
December 3, 1979	Order Jury Trial Begun
December 4, 1979	Order Jury Trial Cont'd (Order of Conviction)
December 4, 1979	Jury Instructions: Granted: #1 thru #14 Refused: #13A, 13B, 13C, 13D
December 4, 1979	Jury Verdict
December 5, 1979	Order (Jury to fix punishment)
December 6, 1979	Order Showing Jury Verdict concerning punishment
December 6, 1979	Jury Instructions: Granted: #1 thru #4 Refused: #1A, #4A, #4B
December 6, 1979	Jury Verdict (Punishment)
January 19, 1980	Doctor's Report on Exam.
January 19, 1980	Brown Envelope with report enclosures inside
January 28, 1980	Pre-Sentence Report
February 6, 1980	Order of Sentencing
February 6, 1980	Instructions Refused: #1A, #1B, #1C, #1D, #1E, #1F

Date	Name of Paper
February 20, 1980	Notice of Appeal
February 6, 1980	List of Commonwealth's Exhibit
	Defendant's Exhibits
	Newspaper Clippings
February 6, 1980	Printed Materials
	Deposition of Gussie Turner
January 15, 1980	Transcript of Trial 4 volumes
February 29, 1980	1 volume
September 3, 1981	Petition for Writ of Habeas Corpus
September 3, 1981	Motion for Stay
September 9, 1981	Order—Stay of Execution
September 9, 1981	Order—Attorney General to file a Responsive Pleading
September 16, 1981	Motion to Dismiss
January 19, 1982	Order—Appointing Attorneys
February 10, 1982	Order—Appointment of Counsel
February 10, 1982	Final Order
March 8, 1982	Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

CA 83-501-N

TURNER, WILLIE LLOYD, PLAINTIFFS

v.

BASS, GARY, Superintendent, DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1983		
July 28	1	Order granting motion to proceed in forma pauperis; filing petition; directing respondents answer within 30 days, entered and filed July 27, 1983. JAMacK, judge. Copies mailed as directed.
July 27	2	Petition for writ of habeas corpus.
July 27	3	Motion for leave to proceed in forma pauperis on behalf of the petition.
July 27	4	Affidavit in support of motion for leave to proceed in forma pauperis.
Aug. 25	5	Motion to dismiss on behalf of the respondents.
	6	Brief received.
Sep. 12	—	State Court records received.
Nov. 1	7	Response to motion to dismiss on behalf of the
	8	petitioner. Brief received.
Nov. 4	9	Order directing the respondent file response on or before December 1, 1983, entered and filed November 4, 1983. JAMacK, judge. Copies mailed as directed.

DATE	NR.	PROCEEDINGS
1983		
Dec. 1	10	Reply to brief in response to motion to dismiss on behalf of the respondents filed in Richmond Division.
1984		
Mar. 19	11	Motion for leave to amend petition (with amended petition) on behalf of petitioner, *lodged.*
Mar. 21	—	Supplemental motion to dismiss, w/brief, on behalf of respondents, *lodged.*
Mar. 26		Court Proceedsing; JAM, j. & JTT, U.S. Mag. Rep. R. Zahn. Present: J. Lloyd Snook, III for petitioner and Robert H. Anderson, III, Ass't Atty. Gen. and Jerry P. Slonaker, Asst. Atty. Gen. for respondent. Came on for hearing on respondent's motion to dismiss and petitioner's cross-motion for summary judgment Court directs filing of amended petition. Motions argued. Court takes matter under advisement. (Hearing being transcribed).
Mar. 26	11	Motion for leave to file amended petition on behalf of petitioner.
Mar. 26	12	First amended petition for writ of habeas corpus on behalf of petitioner filed by direction of Judge MacKenzie.
Mar. 26	13 14	Supplemental motion to dismiss on behalf of defendants. Brief in support of motion, received.
May 8	15	Response to petitioner's supplemental memorandum on behalf of respondent.

DATE	NR.	PROCEEDINGS
1984		
May 23	16	Memorandum order denying and dismissing petition; granting certificate of probable cause; and outlining procedure for noting an appeal; entered and filed May 23, 1984. JAMacK, judge. Copies mailed as directed.
May 23	17	Judgment dismissing action entered by the Clerk May 23, 1984, and filed o.b. Copies mailed.
June 5	18	Motion to alter or amend judgment on behalf of the petitioner.
July 2	19	Motion to alter or amend judgment on behalf of the petitioner. Supplemental memoran-
	20	dum received.
July 9	21	Response to motion to alter or amend judgment on behalf of the respondents filed in Richmond.
July 19	22	Order denying petitioner's motion to alter or amend judgment, entered and filed July 19, 1984. JAMacK, judge. o.b. Copies to counsel.
Aug. 16	23	Notice of appeal on behalf of the petitioner.
Aug. 16	24	Motion for leave to proceed on appeal in forma pauperis.
Aug. 16	25	Affidavit in supoprt of motion to proceed on appeal in forma pauperis on behalf of the petitioner.
Aug. 16	26	Motion for stay on behalf of the petitioner.
Aug. 20	—	Conformed copy of notice of appeal mailed by the Clerk to the Clerk, U.S. Court of Appeals (with a copy of the docket entries) and to Robert H. Anderson, III, Asst. Atty. Gen.
Aug. 21	27	Order denying motion to stay execution, entered and filed August 21, 1984. JAMacK, judge. o.b. Copies mailed as directed.

INDICTMENT

COMMONWEALTH OF VIRGINIA

COUNTY OF SOUTHAMPTON, to-wit:

IN THE CIRCUIT COURT OF SAID COUNTY:

April 16, 1979

The Grand Jurors of the Commonwealth of Virginia in and for the body of the County of Southampton, and now attending the Circuit Court for the said County, upon their oaths present: That on or about the 12th day of July, 1978, in the City of Franklin, Southampton County, Virginia, Willie Lloyd Turner did unlawfully, feloniously, wilfully, deliberately and with premeditation kill W. Jack Smith, Jr. while in the commission of a robbery while armed with a deadly weapon, Va. Code § 18.2-31(d), against the peace and dignity of the Commonwealth of Virginia.

THIS INDICTMENT found at the April Term, 1979, of the Circuit Court of Southampton County, on the evidence of Alan D. Bain witnesses sworn and sent to the Jury by the Court.

VIRGINIA:

IN THE CIRCUIT COURT
OF SOUTHAMPTON COUNTY

COMMONWEALTH OF VIRGINIA, PLAINTIFF

v.

WILLIE LLOYD TURNER, DEFENDANT

PROPOSED QUESTIONS ON VOIR DIRE ON BEHALF OF THE DEFENDANT

(1) Do you know anything about the facts of this case and the charges against Willie Lloyd Turner?

(2) Have you read, seen or heard any news articles of the facts of this case or the charges against the defendant?

(3) Have you heard anyone discuss this case in any way?

(4) Have you formed any opinions as to the guilt or innocence of the defendant, Willie Lloyd Turner?

(5) Have you formed any opinion as to what punishment Willie Lloyd Turner should receive if guilty?

(6) Are you related by blood or marriage to any person who is employed as a policeman or any other law enforcement officer?

(7) Have you or any members of your family been a victim of any crime of any sort? If so, what kind?

(8) (If the answer to the foregoing question is Yes, then ask the following:) Will the fact that you have been related to such a crime affect your ability to reach a fair and impartial verdict based on the evidence in this case?

(9) The defendant in this case, Willie Lloyd Turner, has been convicted of felonies on prior occasions and has previously served time in the penitentiary. Will those facts affect your judgment as to the guilt or innocence of the defendant or in determining the grade of the offense?

(10) The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?

(11) Do you feel that if a person is to be given the death penalty for the unlawful killing of another person, such penalty should be given only if such killing is of the most severe and aggravated nature?

(12) Do you feel that every person convicted of the unlawful killing of another person should receive the death penalty?

(13) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty?

(14) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty if there is a probability that the person would commit criminal acts of violence that would constitute a continuing threat to society?

(15) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty if his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder?

/s/ William R. Savage, III
WILLIAM R. SAVAGE, III

VIRGINIA:

IN THE CIRCUIT COURT
OF NORTHAMPTON COUNTY

COMMONWEALTH OF VIRGINIA

v.

WILLIE LLOYD TURNER, DEFENDANT

REPORTER'S TRANSCRIPT OF RECORD

Before HON. JAMES C. GODWIN, Judge, and jury
Northampton County, Virginia,
December 3, 1979

APPEARANCES: Mr. Richard C. Grizzard,
Commonwealth's Attorney.

Mr. Thomas L. Woodward, Jr., and
Messrs. Glasscock, Gardy & Savage
(Mr. W. Richard Savage, III),
attorneys for the defendant.

* * * *

[7] MR. WOODWARD: Your Honor, on behalf of the defendant, we would also move to dismiss the indictment against him which alleges what is commonly known as capital murder, in that the death penalty itself is unconstitutional in its application and constitutes cruel and

unusual punishment, in violation of Amendments 8 and 14 to the Constitution of the United States; and, further, to the Constitution of the Commonwealth of Virginia.

* * * *

[9] We would further say to the Court that the death penalty or capital murder statute which applies the death penalty as ultimate punishment is [10] unconstitutional in that its application in various states which have adopted United States Supreme Court applied-type statutes that those who are of minority races such as the defendant in this case; those who may suffer from other disabilities by race such as Chicanos, for example, have been disproportionately sentenced to death because of their race; and, further, the race of the victim as studied at Northeastern University in Boston has been shown. We have those in greater detail and we would ask the Court to allow us to submit them subsequently.

I would indicate that in addition to the race of the defendant in a particular case, the race of the victim has a great deal to do with whether he receives the death penalty or not. Those studies which have been conducted in a number of states seem to indicate that in cases where the victim, as in this case, is white that a disproportionate number of defendants are sentenced to death; that where the victim is of a minority group, such as a black, then very seldom is the death penalty applied and, in its application, we state to you that the constitutionality of the death penalty is seriously questioned and we submit to you that in its [11] application it is unconstitutionally applied and is violative of the applicable section of the United States Constitution and the Constitution of the Commonwealth of Virginia. Our motion, therefore, is to dismiss the indictment charging capital murder against the defendant in this case.

MR. GRIZZARD: Your Honor, without going into a lengthy debate or argument as regards the motion, everything that Mr. Woodward has put before the Court has

been ruled on by the Supreme Court of the State of Virginia and has been turned down by that Court. The only thing he brings up new today is some report he indicates from Northwestern and other states indicating, I think his statement was, that the death penalty was inflicted on the basis of race. I think you're taking figures and taking them out of context and that is not evidence as such in this particular matter. It's not for this Court to consider. In Virginia, I think you would have to take it on the cases in Virginia. I have not looked at them to break down who is on Death Row in Virginia and whether the victims are white or black, but I think the statute in Virginia is pretty clear that it doesn't say whether it was a black man or white man who got killed or a black man [12] or white man who was the perpetrator of the crime. The statute states certain prerequisites that have to be met before the death penalty is imposed. That statute is constitutional and has been set so by the state.

MR. WOODWARD: The statement that I made regarding the disproportionate application of the death penalty is based on a study which, again, I would state that we would like to submit subsequently. We would like Mr. Grizzard to see it and it was prepared by Northeastern University, not Northwestern.

MR. GRIZZARD: Excuse me.

MR. WOODWARD: It was prepared there with the idea that the race of the victim indicates disproportionate application of the death penalty, not only in one state, but in a number of states where those studies have been conducted. I do not know of my own knowledge the race of the victims in Virginia who have had defendants sentenced to death. There are, I believe, seven cases since our death penalty statute was revised. My understanding is that all those victims are white and certainly since trials have been conducted since the Virginia statute has been amended, I cannot conceive of no [13] blacks being killed, so our contention is the application is disproportionate because of the race of the victim and, therefore, that

denies equal protection and due process to the defendant. That is the assertion of the Northeastern University study and it's our assertion before you. We would certainly be remiss, however, if we did not state to the Court but for that point, Mr. Grizzard . . . . (unintelligible)

The other points that we have raised have been either directly ruled upon by our Supreme Court or at least laterally spoken to by that Court. Certainly always favorable for the Commonwealth as he has indicated.

THE COURT: Well, gentlemen, of course, our Supreme Court has ruled on this question in practically every case gone up and they have clearly stated that the Virginia statute was constitutional and I so rule at this time and note your exception in the record.

MR. WOODWARD: Your Honor, may we preserve the right to submit that study?

THE COURT: You can submit any study you desire and I will file it as part of the record.

MR. GRIZZARD: Again, like Mr. Savage and [14] Mr. Woodward, before it's submitted in the presence of the jury, I think he should submit it to the Court for argument and discussion outside the presence of the jury.

MR. WOODWARD: We don't intend to submit it before the jury.

THE COURT: It won't be a matter taken up before the jury. We're talking about matters of law.

MR. WOODWARD: Question of law. That's for the Court to decide.

* * * *

[31] MR. GRIZZARD: If it please the Court, the list that's prepared, I assume it's the list with the fifteen questions—

MR. SAVAGE: Right.

MR. GRIZZARD: —that Mr. Savage and Mr. Woodward have been kind enough to provide us a copy of. The Commonwealth would object starting on the second page with the question Number 10. The general question on bias and what-have-you would, I think, satisfy the re-

quirements of Number 10. Number One, this is not a rational case. There are no rational overtones in the allegations of this case. It's a simple case of whether or not the defendant committed murder in the commission of a robbery. The fact that you have got people of different races—victim and perpetrator—is of no consequence and I don't think it is a proper question of inquiry for the jury.

Questions 14 and 15 deal with really instructions that would be pertinent in the second [32] stage of this bifurcated trial. The voir dire question itself is couched in such a way as to ask the juror on voir dire to make a determination as to what his ultimate disposition of the case might be at the end of the case without hearing any of the evidence, without knowing any of the facts and, I think, on that basis it's much too broad. It's improper and it should not be asked. The Commonwealth takes the same position as regards Question Number 15. It's an attempt at this stage to get a juror to commit himself to vote yea or nay on the ultimate issue without hearing any facts or knowing anything about the case.

Questions 11 and 12 and 13 again are asking the jurors to—in effect are attempting to put the jurors on the defensive. If they answer, for instance, in Number 13, "Do you feel that every person convicted of an unlawful killing should receive the death penalty?", if the juror is selected and says no to that question and when the times comes after the evidence has been presented as to mitigation or extenuating circumstances, that juror would be reminded in argument of his pledge on voir dire and then he would be told that if he said he wouldn't do it, he cannot do it. That's [33] the purpose of that type of question. It's to put the jurors on the defensive. It goes to the ultimate issue in the case and, again, the objection to 11, 12 and 13 is that they are improper. They are going to the ultimate issue and are not eliciting proper information on voir dire. The Commonwealth would object to everything from 10 to 15.

THE COURT: How about 9?

MR. SAVAGE: Judge, we withdraw 9 on defendant's motion.

THE COURT: That's what I was wondering.

MR. SAVAGE: No, sir. We proposed these questions several months ago and we want 9 removed.

THE COURT: Gentlemen, as far as 10 through 15 are concerned, Question 10 has been ruled on by the Supreme Court. I'm not going to ask that. Eleven, 13, 14 and 15, I think they are covered adequately and fully by instructions of the Court. I don't think the jury should consider those at this particular time. I will ask the question in the nature of Number 12 as I also do not want a person on the jury who feels that the death penalty should be given in every case of unlawful killing or homicide. Now, are there any other questions?

[34] MR. SAVAGE: Note our exception to the Court's ruling.

* * * *

[43] THE COURT: Ladies and gentlemen, the case that you will hear today is one of Commonwealth of Virginia versus Willie Lloyd Turner. Willie Lloyd Turner is charged with the use of a firearm in the commission of a felony. He's charged with possession of a sawed-off shotgun in the preparation of a robbery. He is charged with capital murder. He is charged with killing W. Jack Smith, Jr., while in the commission of a robbery while armed with a deadly weapon.

Now, these offenses are alleged to have occurred on the 12th day of July, 1978, in the City of Franklin, Virginia. Willie Lloyd Turner, the defendant, is represented in these cases by Mr. William R. Savage from Suffolk, Virginia; Mr. Thomas L. Woodward, Jr., from Suffolk, and the Commonwealth of Virginia is represented in this case by Mr. Richard C. Grizzard, Commonwealth's Attorney [44] for the County of Southampton.

Now, in the case of possession of a sawed-off shotgun in the perpetration of a robbery, it was the perpetration of a robbery of Alan D. Bain.

Now, is there any member of the jury related by blood or marriage to either of the attorneys involved in this case, to the defendant or to the alleged victims, either Alan D. Bain or W. Jack Smith, Jr.?

Now, is there any member of the jury who has any knowledge about the facts of this case?

Have you read or seen any articles in the newspaper or have you heard through any news media, radio, television, through any source, anything about these cases?

Have you heard anyone discuss this case in any way?

Now, are you related by blood or marriage to any person who is employed as a police officer or any other law enforcement agency?

Have you or any members of your family been a victim of any crime?

Now, ladies and gentlemen, one of the charges in this case, the alleged charge of murder of [45] W. Jack Smith, Jr., is a capital case and carries the possibility of the death penalty, if convicted.

Now, Mr. Kellam, do you have any religious or conscientious scruples or objections against the imposition of a sentence of death?

MR. KELLAM: (Shaking head negatively.)

THE COURT: Mrs. Mapp, do you have any religious or conscientious scruples or objections against the imposition of a sentence of death?

MRS. MAPP: No, sir.

THE COURT: Mrs. Holland, do you have any religious or conscientious scruples or objections against the imposition of a sentence of death?

MRS. HOLLAND: No, sir.

THE COURT: Mrs. Bailey, do you have any religious or conscientious scruples or objections against the imposition of a sentence of death?

MRS. BAILEY: No.

THE COURT: Mrs. Merritt, do you have any religious or conscientious scruples or objections against the imposition of a sentence of death?

MRS. MERRITT: No.

THE COURT: Now, do any of you on this panel—do any of you feel that every person convicted of murder of another person should receive the [46] death penalty?

* * * *

[47] THE COURT: Bring them back just one second, Mr. Sheriff. I have got one more question that I want to ask them.

(The four jurors returned to the courtroom.)

THE COURT: Be seated, ladies.

I want to ask you ladies, do any of you know any reason whatsoever why you cannot render a fair and impartial verdict in these cases, either for the defendant or for the Commonwealth of Virginia? Do [48] any of you know why you cannot render an impartial verdict in this case?

THE JURORS: No.

THE COURT: Do any of you know any reason whatsoever why you should not sit as a member of the jury in this case?

THE JURORS: No.

* * * *

PROCEEDINGS IN THE CIRCUIT COURT OF NORTHAMPTON COUNTY

VIRGINIA:

IN THE CIRCUIT COURT
OF NORTHAMPTON COUNTY

The 6th day of December, 1979

86-79

COMMONWEALTH

vs.

WILLIE LLOYD TURNER

Court convened at 9:40 o'clock a.m.

After hearing the additional evidence, instructions of the Court and argument of counsel, the jurors were sent to the jury room to consider their sentence. They subsequently returned their sentence in open court in the following words:

> "We, the Jury, on the issue joined, having found the defendant guilty of Capital Murder of W. Jack Smith, Jr., as charged in the indictment, and having found that, after consideration of his past criminal record that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society and/or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind; aggravated battery to the

victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

/s/ J. E. Worsley
Foreman"

The Court, before fixing punishment or imposing sentence, doth direct the Probation Officer of this Court to thoroughly investigate and report to the Court as provided by law, and sentencing is to be set on a date to be determined by the Court.

The Court orders that a transcript of this trial be made a part of the record and this case is continued.

The Court certifies that at all times during the trial of this case the defendant was personally present and his attorneys were likewise personally present and capably represented the defendant.

And the defendant is remanded to jail.

Enter the 6th day of December, 1979.

/s/ James C. Godwin
Judge

VIRGINIA:

IN THE CIRCUIT COURT OF
SOUTHAMPTON COUNTY

WILLIE LLOYD TURNER, PETITIONER

v.

EDWARD C. MORRIS, RESPONDENT

STATEMENT OF FACTS

1. The purpose of the hearing was to afford counsel for each party the opportunity to present legal arguments as to whether respondent's motion to dismiss the habeas corpus petition should be granted in lieu of having a plenary hearing.

2. At the outset of the hearing, counsel for petitioner acknowledged that the only grounds that had not previously been raised either at trial or on direct appeal to the Supreme Court of Virgina and thus which were now reviewable were the matters contained in allegations (2), (3), (12) and (16) in the petition. Counsel then presented arguments concerning allegations (2), (12) and (16). No arguments regarding allegation (3) were presented by either party.

3. With respect to allegation (2), counsel for petitioner referred to a study which was under preparation and which was alleged to deal with the application of the death penalty in Virginia. Counsel stated that he hoped that the study would be ready in two to three weeks but was unable to represent to the Court when it might be available and also was not in the position to indicate what the ultimate findings were likely to be. Counsel additionally stated that trial counsel for petitioner had known nothing about such a pending study at the time of the trial.

4. With respect to allegation (12), counsel for petitioner presented various arguments in support of his claim that trial counsel had failed to adequately investigate or present expert psychiatric evidence on behalf of petitioner at trial. In part, counsel proffered that defense counsel had not consulted any psychiatrists or psychiatric experts other than Dr. Bransfield in attempting to familiarize themselves with the psychiatric issues involved in the case. Counsel also offered to establish that the trial attorneys had not adequately researched comparable murder statutes in various other jurisdictions regarding the definition and application of the mitigating factors set forth in § 19.2-264.4B of the Code of Virginia (1950), as amended. Petitioner's attorney also challenged the failure of trial counsel to prepare jury instructions defining the terms "extreme mental or emotional disturbance" or "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."

5. In response to these arguments, counsel for respondent referred the court to the testimony of Dr. Robert Bransfield, a witness for petitioner. Dr. Bransfield was permitted on direct examination to testify that in his view petitioner was under the influence of mental disturbance while he was committing the crime. It was pointed out that this answer precisely tracked the language set forth in § 19.2-264.4B.

6. With respect to allegation (16), counsel for the opposing parties briefly presented arguments consistent with the contentions advanced in the petition for a writ of habeas corpus and Motion to Dismiss, respectively.

7. At the conclusion of the hearing, the Court indicated that it would take the case under advisement. By order of February 10, 1982, the court denied and dismissed the petition.

June 3, 1982

/s/ James C. Godwin
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

WILLIE LLOYD TURNER, PETITIONER

v.

GARY BASS, RESPONDENT

**FIRST AMENDED PETITION
FOR WRIT OF HABEAS CORPUS**

TO THE HONORABLE JUDGE OF THE SAID COURT:

Now comes your Petitioner, Willie Lloyd Turner, and represents unto this Honorable Court that he is illegally held, under sentence of death, in the custody, confinement and restraint of the Respondent, his agents and employees, at the Mecklenburg Correctional Center of the Virginia Department of Corrections, located in Boydton, in the County of Mecklenburg, Virginia, and that his confinement under sentence of death is illegal for the reasons set forth below.

* * * *

IX. *The trial court's failure to permit individual voir dire, to allow any questioning into the racial attitudes of jurors, to probe the jurors' understanding of the presumption of innocence, reasonable doubt, and burden of proof, and to fully question jurors about their views on the death penalty deprived Petitioner of his rights to a trial by a fair and impartial jury and to due process of law under the Sixth and Fourteenth Amendments to the United States Constitution.*

68. Counsel requested that *voir dire* be conducted of each venireman individually, so that biases could not be

communicated among veniremen impermissibly. This request was reiterated after venireman Cosby Kellam's response, as counsel was concerned that the other jurors were tainted by having heard Mr. Kellam's response. The request was denied.

69. Petitioner is a black man; his victim, Jack Smith, was white. Counsel asked the court to *voir dire* the panel to determine whether their racial attitudes would affect their deliberations. The court refused to question the panel on their racial attitudes, denying Petitioner his right to a jury free from racial bias. *Rosales-Lopez v. United States*, 451 U.S. 182 (1981).

70. The trial court failed to *voir dire* the panel on their ability to comprehend and to follow the legal principles involved. Statistical evidence reveals that as many as 37% of the American people do not understand the presumption of innocence—they believe that the defendant in a criminal trial has a burden to acquit himself. *Voir dire* is necessary to determine whether these veniremen in fact shared these views.

71. The trial court asked only two simple, superficial questions concerning the attitude of the jurors toward the death penalty. None of the jurors was ever asked the proper question—whether their attitudes toward the death penalty were so firmly held that they would not be able to follow the instructions of the court.

72. Petitioner was denied his right to have a meaningful *voir dire*, sufficient to assure that Petitioner would not be tried by a jury that was biased against him because of his race, or by a jury that did not understand and could not follow the presumption of innocence, or by a jury that could not follow the instructions of the trial court. The trial court's handling of *voir dire* violated Petitioner's rights to a fair and impartial jury and to the due process of law, rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 83-501-N

WILLIE LLOYD TURNER, PETITIONER

v.

GARY BASS, Superintendent, RESPONDENT

BRIEF IN RESPONSE TO MOTION TO DISMISS

Petitioner has alleged sixteen separate counts of unconstitutional detention. Rather than proceed *seriatim* through each of the sixteen arguments, Petitioner will discuss all of the unconstitutionality issues together, all of the jury issues together, and so on, to avoid repetitious argument.

STATUTORY UNCONSTITUTIONALITY

Petitioner has raised seven counts (I, II, III, IV, XIV, XV, and XVI) in which he attacks the constitutionality, either facially or as applied, of the Virginia death penalty statutes.

In Count XIV, he alleges that execution by electrocution is cruel and unusual punishment. That issue will be dealt with at the end of this brief. Of the remaining issues, Respondent has argued that five of them (I, III, IV, XV and XVI) are controlled by prior decisions of the United States Supreme * * *

* * * *

	Estimated Number of Offenders	Persons Sentenced to Death	Probability of a Death Sentence
Black kills White	443	100	22.57%
White kills White	857	123	14.35%
Total—White Victim	1,300	223	17.15%
Black kills Black	441	17	3.85%
White kills Black	50	2	4.00%
Total—Black Victim	491	19	3.87%
Total—All Victims	1,791	242	13.47%

From this very rough data, two trends may be noted. First, there appears to be a very strong likelihood that the race of the offender and the race of the victim (and, in particular, the way in which those two variables interact) will have a very large effect upon whether a particular defendant receives the death sentence. This is true across the country, as the survey from Georgia, Florida, Texas, Alabama and Ohio shows. The Virginia Supreme Court dismissed this data out of hand, as not having been related to Virginia.

With the data that we do have, we can see, in rough outline, that there is certainly a disparate impact upon blacks, and, particular, upon blacks who kill whites. Petitioner will be the first to concede that the data that he has thus far accumulated on Virginia is not subject to rigorous statistical analysis. But the data does raise a showing of disparate impact that is strong enough that this court should allow further inquiry.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 83-501-N

WILLIE LLOYD TURNER, PETITIONER

v.

GARY BASS, RESPONDENT

MOTION TO ALTER OR AMEND JUDGMENT

* * * *

The second issue on which this Motion is based is the refusal of this Court to permit an evidentiary hearing.

* * *

In the attached Supplemental Memorandum, incorporated herein by reference, Petitioner has spelled out 10 different topics on which an evidentiary hearing is necessary. An eleventh was omitted, though it is arguably included in other paragraphs—that the tendency to apply disproportionately the death penalty to blacks who are charged with killing whites is, if not cause for striking down the statute, at least sufficient evidence of discrimination to make it mandatory for a trial judge to voir dire the jury concerning racial prejudice in a case where a black man is faced with the death penalty for killing a white.

In support of these claims, Petitioner introduced at trial a study by Bowers and Pierce; in recent years other studies have been done, on which Petitioner would rely, if given the opportunity. *See, e.g.*, Paternoster, "Race of Victim and Location of Crime: The Decision to Seek

the Death Penalty in South Carolina", 74 J. Crim. L. & Criminology 754 (1983); Gross and Mauro, "Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization", (Prepublication Draft, October, 1983).

If afforded an opportunity in an evidentiary hearing, Petitioner would expect to put on evidence from social scientists such as Professor Paternoster (Assistant Professor at the University of Maryland). Professor Paternoster is familiar with and able to present the studies of Professors Gross and Mauro, as well as the research that has been done by Professors Bowers and Pierce at Northeastern University, whose early work was manifested in the report that was introduced at trial. Bowers and Pierce did much of the seminal work in statistical evaluation of discrimination—in employment and education contexts as well as in capital sentencing law. Their research on the discriminatory impact of the death penalty has been the basis for most of the post-*Furman* research in the area. Bowers & Pierce "Arbitrariness and Discrimination under Post-*Furman* Capital Statutes", 26 Crime & Delinq. 563 (1980). *See also* Bowers, "The Pervasiveness of Arbitrariness and Discrimination under Post-*Furman* Capital Statutes", 74 J. Crim. L. & Criminology 1067 (1983).

For the purposes of an offer of proof in support of this Motion, Petitioner submits herewith a copy of the Gross and Mauro study, "Patterns of Death," as Petitioner's Exhibit One. That study was done in eight states; Georgia, Florida and Illinois are discussed at length in the body of the article (that portion of the article has not been submitted to this Court, because of its marginal relevance; that is why pages 42 through 90 are missing), while the results from Arkansas, Mississippi, North Carolina, Oklahoma and Virginia are described briefly in the text and presented in summary form in an appendix. The results from those five states, including Virginia, are summarized beginning at page 91.

Gross and Mauro caution that the statistics from Virginia, if viewed in isolation, may be suspect because the number of death sentences reviewed—19—was simply too small.

> Considered in isolation, such small numbers make any sentencing pattern hard to discern: only very strong effects can be seen clearly with so few observations. Some of the racial disparities that we report would not, on their own, constitute convincing proof of racial discrimination; this is particularly true for Arkansas and Virginia, in each of which we studied fewer than twenty death sentences. If we were examining the data from one of the states separately from the rest we would conclude that there is good reason to suspect racial discrimination in capital sentencing—indeed, that it is more likely than not—but that it is too early to tell for sure. But we are not considering these states in isolation, and we are not primarily interested in determining the existence of racial discrimination in any particular state.
>
> Viewed collectively, the data from these five states show a remarkably consistent pattern of racial disparities.

Pre-publication draft at 91-92. The study concluded that

> In Virginia the odds of receiving the death penalty for killing a white were 2.41 times greater than the odds of receiving the death penalty for killing a black.

Id. at 96. Because of the small sample size, this number, taken by itself and out of the context provided by the other states, is not statistically significant proof that the race of the victim has an effect on the probability of receiving the death penalty. *Id.* at 94. However,

> When we examined the effect of the race of the victim in models that included the race of the suspect as a variable the general picture remained essentially unchanged. In North Carolina the race-of-victim effect became smaller and statistically nonsignificant; in the remaining four states—Oklahoma, Mississippi, Virginia, and Arkansas—the effect became larger.

Id. at 96-97.

This evidence is precisely the point of our claim—even if the data is not sufficient at this point to prove that the death penalty is being discriminatorily applied in Virginia, a contention that can only be sustained if the data from the rest of the country is ignored, it is certainly sufficient to raise a strong question about the possible impact of racial bias in the decision of a jury to impose the death sentence. Even if the data is therefore insufficient to strike down the death penalty statutes, it is clearly sufficient to support counsel's timely request for voir dire on racial prejudice in a case in which a black man is accused of killing a white man.

We ask this Court to do either or both of the following:

1. Allow an evidentiary hearing on the question of whether racial prejudice affects the decision to impose death;

2. Consider the evidence in the proffered Gross and Mauro study, together with the other work that has been done in the field of discrimination, and reconsider this Court's decision not to grant the Petition for Writ of Habeas Corpus.

* * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-4004

WILLIE LLOYD TURNER, APPELLANT

vs.

GARY BASS, APPELLEE

APPELLANT'S OPENING BRIEF

J. LLOYD SNOOK, III
Paxson, Smith, Gilliam &
Scott, P.C.
418 East Water Street
Post Office Box 2737
Charlottesville, VA 22902
(804) 296-2161

Counsel for Appellant

* * * *

Of course, Bowers & Pierce did not study Virginia death sentences. However, Gross & Mauro did study the Virginia death sentences in nineteen cases, as compared to 1,389 criminal homicides. The results, put in rough statistical terms, shows that one who kills a white victim is four times more likely to receive the death sentence than one who kills a black victim (2.3% to 0.5%). If a black kills a white, he has an 8.2% chance of receiving the death penalty; if a white kills a white, he has a 1.3% chance of receiving the death penalty; if a black kills a black, he has a 0.6% chance of receiving a death penalty; and no white has received the death penalty for killing a black since Virginia's new statute was enacted in 1977.

There are currently twenty-seven on Virginia's death row; two have died while on death row (one by execution). Of those twenty-nine men, sixteen are black, one is Asian, one was Mexican and eleven are white.

The statistics just mentioned, though perhaps supportive of a claim of race discrimination in other states is admittedly not conclusive in Virginia to justify the drastic step of declaring the system to be unconstiutional.[2] * * *

* * * *

> Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting

---

[2] This Court recently rejected such a claim in *Shaw v. Martin*, 733 F.2d 304 (4th Cir. 1984). The claim in *Shaw* was based on proffered data from Professor Raymond Paternoster. As this Court noted, *id.* at 312, Dr. Paternoster's data was "hardly significant" to show discrimination—the difference was between 6.2% and 4.2%, as opposed to 2.3% and 0.5% in Virginia.

Another flaw in Dr. Paternoster's research was that "it did not adequatley compare murders of similar atrocity." *Id.* Gross and Mauro did control for that variable; the small sample size was one reason that they cautioned against "considering these states in isolation." App. 420. The new data for crimes of comparable atrocity is consistent with, but cannot itself prove, discriminatory impact. See Table 12, App. 433.

> the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with [racial prejudice] amount to an unconstitutional abuse of discretion.

451 U.S. at 190.

The question, therefore, is whether there is any "special circumstance" that makes it likely that racial prejudice will be an issue in this case.

There is nothing relating to the facts of this particular case that suggest racial antagonism. However, this is a capital murder case. As discussed above, capital murder cases often involve racial prejudice, even when obvious issue of racial import is present in the case. This is unavoidable.

It is well known that jurors perceive blacks and whites differently. In their classic study, Kalven & Zeisel noted that jurors tend to be less sympathetic to black defendants than to white defendants; less sympathetic jurors are more likely to convict, and are more likely to impose the death sentence. H. Kalven and H. Zeisel, *The American Jury*, 210 (1966). Capital murder trials necessarily involve asking the jurors to act as the conscience of the community. They are not only applying facts to clear, precise issues of law; they are also, to a certain extent, defining the law. They are taking the very rough standards provided by the instructions, and are fashioning those standards into a community standard—the conscience of the community. * * *

* * * *

PRE-PUBLICATION DRAFT

PLEASE DO NOT QUOTE OR CITE
WITHOUT PERMISSION

PATTERNS OF DEATH:

AN ANALYSIS OF RACIAL DISPARITIES

IN CAPITAL SENTENCING AND

HOMICIDE VICTIMIZATION

Samuel R. Gross
Standford University
School of Law

Robert Mauro
Standford University
Department of Psychology

October 1983

* * * *

V. *Racial Patterns in Capital Sentencing in Oklahoma, North Carolina, Mississippi, Virginia and Arkansas*

So far we only discussed Georgia, Florida and Illinois. Our findings in the other five states in this study—Oklahoma, North Carolina, Mississippi, Virginia and Arkansas—are summarized in an appendix.[179] In this section we will merely touch on the major racial pattern that we found in each of these states: disproportionate capital sentencing for white-victim homicides.

A word of caution is in order. As we go down the list of states from Oklahoma to Arkansas our data become increasingly attenuated. Our study includes 43 death sentences in Oklahoma, 27 in North Carolina,[180] 22 in Mississippi, 19 in Virginia and 15 in Arkansas. Considered in isolation, such small numbers make any sentencing patterns hard to discern: only very strong effects can be seen clearly with so few observations.[181] Some of the racial disparities that we report would not, on their own, constitute convincing proof of racial discrimination; this is particularly true for Arkansas and Virginia, in each of which we studied fewer than twenty death sentences. If we were examining the data from one of the states sepa-

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[179] *See infra* Appendix 2.

[180] Two of these cases involved Indian victims and defendants, and one involved an Indian defendant and a black victim. *See supra* note 103 and accompanying text.

[181] The problem of small numbers is considerably less pronounced in Oklahoma, where we had only two fewer death sentences than in Illinois, than it is in the remaining four states. But in Oklahoma there is an additional problem: because of the relatively small proportion of black-victim homicides—less than a third of the total—the expected numbers of black-victim death sentences in some categories (i.e., the numbers that would be found in the absence of racial disparities) are quite small. This statistical fact makes it more difficult to detect disparities that further reduce the numbers of black-victim death sentences.

rately from the rest we would conclude that there is good reason to suspect racial discrimination in capital sentencing—indeed, that it is more likely than not—but that it is too early to tell for sure. But we are not considering these states in isolation, and we are not primarily interested in determining the existence of racial discrimination in any particular state.

Viewed collectively, the data from these five states show a remarkably consistent pattern of racial disparities. Table 30 illustrates this pattern: considering felony and non-felony homicides separately, black-victim homicides in each state were substantialy less likely to receive death sentences than white-victim homicides.

Table 30

Percentage of Death Sentences by Felony Circumstances and Race of Victim

	Felony		Non-Felony	
	Oklahoma			
White Victim	30.6%	(22/72)	3.7%	(18/482)
Black Victim	0%	(0/17)	1.4%	(3/221)
	North Carolina			
White Victim	13.6%	(14/103)	1.0%	(7/678)
Black Victim	4.3%	(2/46)	0.2%	(2/869)
	Mississippi			
White Victim	32.5%	(13/40)	2.6%	(4/151)
Black Victim	9.5%	(4/42)	0.2%	(1/564)
	Virginia			
White Victim	14.3%	(13/91)	0.4%	(2/497)
Black Victim	6.9%	(4/58)	0%	(0/649)
	Arkansas			
White Victim	9.2%	(8/87)	1.5%	(5/332)
Black Victim	4.5%	(2/44)	0%	(0/406)

In Table 31 white-victim and black-victim homicides in each of these states are tabulated by level of aggravation. Again, as in Georgia, Florida and Illinois,[182] we see disproportionate capital sentencing for white-victim cases in each state at each level of aggravation.

Table 31

Percentage of Death Sentences
By Level of Aggravation and Race of Victim

	Number of Major Aggravating Circumstances		
	0	1	2-3
	Oklahoma		
White Victim	1.5% (6/389)	12.8% (15/117)	38.8% (19/49)
Black Victim	0.5% (1/210)	6.3% (2/32)	0% (0/8)
p	.231	.243	.030
			Overall p = .***
	North Carolina		
White Victim	0.9% (5/588)	1.7% (3/176)	17.6% (13/74)
Black Victim	0.1% (1/803)	0% (0/133)	8.0% (2/25)
p.	.052	.183	.207
			Overall p = .***
	Mississippi		
White Victim	1.5% (2/134)	15.9% (7/44)	27.6% (8/29)
Black Victim	0.% (0/525)	1.1% (1/95)	21.1% (4/19)
p	.041	.001	.437
			Overall p = .***
	Virginia		
White Victim	0% (0/454)	4.5% (5/112)	13.1% (10/76)
Black Victim	0% (0/615)	2.0% (2/99)	7.1% (2/28)
p	—	.227	.319
			Overall p = .***
	Arkansas		
White Victim	0% (0/265)	8.9% (8/90)	12.1% (5/41)
Black Victim	0% (0/338)	2.2% (1/45)	6.7% (1/15)
p	—	.134	.485
			Overall p = :***

[182] *See supra* Table 23.

We also constructed logistic regression models for these five states following the procedures described earlier.[183] The race-of-victim coefficients for the "best fitting" models for each of these states are reported in Table 32. As Table 32 shows, the race of the victim had sizeable effects on the likelihood that a defendant would receive the death penalty in Oklahoma, North Carolina, and Mississippi and these effects were statistically significant beyond the conventional .05 level. In Virginia and Arkansas the race of the victim had less pronounced and statistically nonsignificant effects.

In Mississippi the overall odds that an offender would receive the death penalty for killing a white victim were 5.47 times greater than the odds that an offender would receive the death penalty for killing a black victim.[184] In North Carolina the overall odds that an offender would receive the death penalty for killing a white were 4.35 times greater than for killing a black.[185] In Oklahoma the odds of receiving the death penalty for killing a white were 4.31 times greater than the odds of receiving the death penalty for killing a black.[186] In Arkansas the odds of receiving the death penalty for killing a white were 3.56 times greater than the odds of receiving the death penalty for killing a black,[187] and in Virginia the odds of receiving the death penalty for killing a white were 2.41 times greater than the odds of receiving the death penalty for killing a black.[188]

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[183] [Footnote illegible].

[184] Change in $X^2(1) = 9.49$, $p = .002$, $B = 1.70$, s.e. $= .580$, model $X^2(31) = 30.258$, n.s.

[185] Change in $X^2(1) = 5.767$, $p = .016$, $B = 1.47$, s.e. $= .683$, model $X^2(30) = 23.399$, n.s.

[186] Change in $X^2(1) = 6.468$, $p = .011$, $B = 1.46$, s.e. $= .660$, model $X^2(25) = 22.001$, n.s.

[187] Change in $X^2(1) = 2.84$, $p = .092$, $B = 1.27$, s.e. $= .838$, model $X^2(32) = .97$, n.s.

[188] Change in $X^2(1) = 2.136$, $p < .20$, $B = .88$, s.e. $= .636$, model $X^2(38) = .94$, n.s.

When we examined the effect of the race of the victim in models that included the race of the suspect as a variable [189] the general picture remained essentially unchanged. In North Carolina the race-of-victim effect became smaller and statistically non-significant; in the remaining four states—Oklahoma, Mississippi, Virginia, and Arkansas—the effect became larger.[190] (In Arkansas a previously non-significant effect became statistically significant when we controlled for the race of suspect.)[191]

[Table 33 goes here]

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[189] See *supra* text accompanying note 135.

[190] North Carolina: change in $X^2(1)$ due to victim's race=1.96, n.s., B=1.77, s.e.=.811, model $X^2(51)=32.312$, n.s.; Oklahoma: change in $X^2(1)$ due to victim's race=5.29, p=.021, model $X^2(46)=43.936$, n.s.; Mississippi: change in $X^2(1)$ due to victim's race=9.88, p=.002, B=1.94, s.e.=.644, model $X^2(50)=56.031$, n.s.; Virginia: change in $X^2(1)$ due to victim's race=2.41, n.s., model $X^2(60)=43.509$, n.s.; Arkansas: change in $X^2(1)$ due to victim's race=8.00, p=.005, B=2.49, s.e.=1.02, model $X^2(51)=35.897$, n.s.

[191] The race of suspect coefficient itself was statistically significant in Arkansas (B=1.79, s.e.=.719) but not elsewhere. We also controlled for the race of the suspect by looking separately at the subsets of cases with black suspects. (*See supra* notes 136-39 and accompanying text); we found significant race-of-victim effects within these subsets in Oklahoma, Mississippi, Virginia, and Arkansas, but not in North Carolina. When we examined white-victim cases separately, we found significant race-of-suspect effects among these cases in Mississippi and Arkansas but not in the other three states. (Mississippi: change in $X^2(1)$ due to suspect's race=6.53, p=.011, B=1.83, s.e.=.735, model $X^2(27)=34.832$, n.s. Arkansas: change in $X^2(1)$ due to suspect's race=8.70, p=.003, B=2.34, s.e.=.875, model $X^2(28)=24.026$, n.s.).

Table 33 presents the same type of analysis that we presented in Table 25 for Georgia, Florida, and Illinois. It displays the predicted probabilities of a death sentence that are generated by the "best fitting" regression models for these five states, comparing hypothetical high aggravation and low aggravation cases with black victims to otherwise identical cases with white victims. In each state the predicted probability of a death sentence was much higher for homicides with white victims than for homicides with black victims, among high-aggravation and low-aggravation cases alike.[192]

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[192] The location of the homicide (urban or rural) did not have a statistically significant effect on capital sentencing in any of these states. Furthermore, controlling for geographic location in addition to the other variables included in the reported models did not substantially alter the effect of the race of the victim on capital sentencing in any of these states.

APPENDIX 2

Racial Patterns in Capital Sentencing: Oklahoma, North Carolina, Mississippi, Virginia and Arkansas

1. VIRGINIA

Percentage of Death Sentences
By Race of Victim

White Victim	2.3%	(15/646)
Black Victim	0.5%	(4/742)
All Cases	1.4%	(19/1389)

2. VIRGINIA

Percentage of Death Sentences
By Race of Victim and Suspect

Black Kills White	8.2%	(8/98)
White Kills White	1.3%	(7/544)
Black Kills Black	0.6%	(4/703)
White Kills Black	0%	(0/39)

3. VIRCINIA

Percentages of Death Sentences
By Race of Victim
And Felony Circumstance

	Felony		Non-felony	
White Victim	14.3%	(13/91)	0.4%	(2/497)
Black Victim	6.9%	(4/58)	0%	(0/649)

4. VIRGINIA

Percentages of Death Sentences,
By Race of Victim and Suspect,
And Felony Circumstance

	Felony		Non-felony	
Black Kills White	17.4%	(8/46)	0%	(0/35)
White Kills White	11.1%	(5/45)	0.4%	(2/458)
Black Kills Black	7.0%	(4/57)	0%	(0/611)
White Kills Black	0%	(0/1)	0%	(0/38)

5. VIRGINIA

Percentages of Death Sentences by Race of Victim and Relationship of Victim to Suspect

	Stranger Homicides		Non-stranger Homicides	
White Victim	7.6%	(10/132)	1.0%	(5/196)
Black Victim	1.3%	(1/75)	0.4%	(3/657)

6. VIRGINIA

Percentages of Death Sentences By Race of Victim and Suspect, And Their Relationship

	Stranger Homicides		Non-stranger Homicides	
Black Kills White	10.3%	(6/58)	6.3%	(2/32)
White Kills White	5.4%	(4/74)	0.7%	(3/460)
Black Kills Black	1.8%	(1/57)	0.5%	(3/636)
White Kills Black	0%	(0/18)	0%	(0/21)

7. VIRGINIA

Percentages of Death Sentences By Race of Victim and Number of Victims

	Multiple Victims		Single Victim	
White Victim	9.7%	(3/31)	2.0%	(12/615)
Black Victim	7.1%	(1/14)	0.4%	(3/728)

8. VIRGINIA

Percentages of Death Sentences By Race of Victim and Suspect, And Number of Victims

	Multiple Victims		Single Victim	
Black Kills White	20.0%	(2/10)	6.8%	(6/88)
White Kills White	5.0%	(1/20)	1.1%	(6/524)
Black Kills Black	7.1%	(1/14)	0.4%	(3/689)
White Kills Black	———		0%	(0/39)

9. VIRGINIA

Percentage of Death Sentences By Race and Sex of Victim

	Female Victim		Male Victim	
White Victim	4.6%	(9/195)	1.3%	(6/451)
Black Victim	1.7%	(3/178)	0.2%	(1/564)

10. VIRGINIA

Percentage of Death Sentences By Race of Victim And Means of Killing

	Guns		Other means	
White Victim	1.5%	(7/463)	5.0%	(8/159)
Black Victim	0.4%	(2/507)	0.9%	(2/224)

11. VIRGINIA

Percentage of Death Sentences by Race of Victim And Location of Homicide

	Rural		Urban	
White Victim	2.1%	(6/287)	2.5%	(9/359)
Black Victim	0.4%	(1/236)	0.6%	(3/506)

12. VIRGINIA

Ratio of Death Sentences by Race of Suspect and Victim And Number of Reported Aggravating Circumstances

	Number of Aggravating Circumstances				
	0	1	2	3	Totals
Black Kills White	0% (0/29)	4.5% (1/22)	14.6% (6/41)	16.7% (1/6)	8.2% (8/98)
White Kills White	0% (0/425)	4.4% (4/90)	10.7% (3/28)	0% (0/1)	1.3% (7/544)
Black Kills Black	0% (0/594)	2.4% (2/82)	8.0% (2/25)	0% (0/2)	0.6% (4/703)
White Kills Black	0% (0/21)	0% (0/17)	0% (0/1)	——	0% (0/39)

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PRELIMINARY TABULATIONS REFLECTING ARBITRARINESS AND DISCRIMINATION UNDER POST-*FURMAN* CAPITAL STATUTES

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Table 1—GEO

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM IN GEORGIA FROM THE EFFECTVE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	Estimated Number of Offenders [a]	Persons Sentenced to Death	Probability of a Death Sentence
White	1082	41	.038
Black	2716	49	.018
Race of Victim			
White	1265	76	.060
Black	2529	14	.005
Offender/Victim Racial Combinations			
Black Kills White	258	37	.143
White Kills White	1006	39	.039
Black Kills Black	2458	12	.005
White Kills Black	71	2	.028
All Offenders	3798	90	.024

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from April 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Criminal Activity Reporting Unit, Georgia Bureau of Investigation, Georgia Crime Information Center, Atlanta, Georgia; (3) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (4) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

[a] The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 4.453 equals the number of homicide victims from April 1973 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2). See Appendix A for a further discussion of the adjustment procedure.

Table 1—FLA

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM IN FLORIDA FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	Estimated Number of Offenders [a]	Persons Sentenced to Death	Probability of a Death Sentence
White	2265	72	.032
Black	2606	61	.023
Race of Victim			
White	2439	122	.050
Black	2432	11	.005
Offender/Victim Racial Combinations			
Black Kills White	286	48	.168
White Kills White	2146	72	.034
Black Kills Black	2320	11	.005
White Kills Black	111	0	.000
All Offenders	4871	133	.027

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program, Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

[a] The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by victim-based adjustment factor to correct for undercoverage. The adjustment factor 3.484 equals the number of homicide victims from January 1973 through December 1977 (sources: 1, 2) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2). See Appendix A for a further discussion of the adjustment procedure.

Table 1—TEX

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM IN TEXAS FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	Estimated Number of Offenders [a]	Persons Sentenced to Death	Probability of a Death Sentence
White	3771	38	.010
Black	2940	29	.010
Race of Victim			
White	3964	71	.018
Black	2740	2	.001
Offender/Victim Racial Combinations			
Black Kills White	344	27	.078
White Kills White	3616	37	.010
Black Kills Black	2597	2	.007
White Kills Black	143	0	.000
All Offenders	6711	73	.011

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1974 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reporting Bureau, Texas Department of Public Safety, Austin, Texas; (3) Vital Statistics records on willful homicides from January 1974 through December 1977, supplied by the Bureau of Vital Statistics, Texas Department of Health, Austin, Texas; (4) persons sentenced to death from January 1974 through December 1977, supplied by the Office of Court Administration, The Supreme Court of Texas, Austin, Texas.

[a] The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 2.473 equals the number of homicide victims from January 1974 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2). See Appendix A for a further discussion of the adjustment procedure.

Table 1—ALA

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM IN ALABAMA FROM THE EFFECTIE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	Estimated Number of Offenders [a]	Persons Sentenced to Death	Probability of a Death Sentence
White	462	35	.076
Black	933	6	.006
Race of Victim			
White	419	19	.045
Black	976	22	.023
Offender/Victim Racial Combinations			
Black Kills White	70	16	.229
White Kills White	392	19	.049
Black Kills Black	906	6	.007
White Kills Black	27	0	.000
All Offenders	1395	41	.030

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data for 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Vital Statistics tabulations on willful homicide for April 1976 through 1978, Division of Vital Statistics, State Department of Public Health, Montgomery, Alabama; (3) persons sentenced to death, supplied by the Southern Poverty Law Center, Montgomery, Alabama.

[a] The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976 (source: 1) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 3.099 equals the number of homicide victims from April 1976 through December 1978 (source: 2) divided by the number of homicide victims in the years 1976 (source: 1). See Appendix A for a further discussion of the adjustment procedure.

Table 4.2—GEO

PROBABILITY OF A DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE AND AGE OF VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* CAPITAL STATUTE THROUGH 1977

Age and Race of Victim	Number of Victims	Number of Death Sentences	Probability of a Death Sentence
0-20 years			
White	51	16	.313
Black	36	5	.149
21-30 years			
White	83	13	.157
Black	47	3	.021
31-50 years			
White	113	9	.080
Black	65	1	.015
Over 50 years			
White	146	26	.178
Black	47	2	.043

Data Sources: (101 Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (2) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

Table 1—OHIO

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM IN OHIO FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	Estimated Number of Offenders [a]	Persons Sentenced to Death	Probability of a Death Sentence
White	850	45	.053
Black	1343	57	.042
Race of Victim			
White	976	82	.084
Black	1217	20	.016
Offender/Victim Racial Combinations			
Black Kills White	173	37	.214
White Kills White	803	45	.056
Black Kills Black	1170	20	.017
White Kills Black	47	0	.000
All Offenders	2193	102	.047

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1975 to December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Ohio Bureau of Criminal Identification, Columbus, Ohio; (3) Vital Statistics tabulations on willful homicides, supplied by Division of Physical Health, Atlanta, Georgia; (4) persons sentenced to death, supplied by the Adult Parole Authority, Columbus, Ohio.

[a] The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 1.871 equals the number of homicide victims from January 1975 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2). See Appendix A for a further discussion of the adjustment procedure.

Table 2—GEO

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE OF OFFENDER AND VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	Estimated Number of Offenders [a]	Persons Sentenced to Death	Probability of a Death Sentence
White	196	37	.189
Black	338	42	.124
Race of Victim			
White	316	69	.218
Black	218	10	.046
Offender/Victim Racial Combinations			
Black Kills White	134	34	.254
White Kills White	183	35	.191
Black Kills Black	205	8	.039
White Kills Black	13	2	.154
All Offenders	534	79	.148

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from April 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Criminal Activity Reporting Unit, Georgia Bureau of Investigation, Georgia Crime Information Center, Atlanta, Georgia; (3) Vital Statisitcs tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (4) Persons sentenced to death from April 1973 through December 1977, supplied by Georgia Committee Against the Dealth Penalty, Atlanta, Georgia.

[a] The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 4.453 equals the number of homicide victims from April 1973 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977, (sources: 1, 2). See Appendix A for a further discussion of the adjustment procedure.

Table 2—FLA

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR FELONY TYPE MURDER BY RACE OF OFFENDER AND VICTIM IN FLORIDA FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	Estimated Number of Offenders [a]	Persons Sentenced to Death	Probability of a Death Sentence
White	307	54	.176
Black	251	50	.199
Race of Victim			
White	432	97	.224
Black	122	7	.057
Offender/Victim Racial Combinations			
Black Kills White	136	41	.301
White Kills White	296	54	.182
Black Kills Black	115	7	.061
White Kills Black	7	0	.000
All Offenders	558	104	.186

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program, Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

[a] The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by victim-based adjustment factor to correct for undercoverage. The adjustment factor 3.484 equals the number of homicide victims from January 1973 through December 1977 (sources: 1, 2) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2). See Appendix A for a further discussion of the adjustment procedure.

Table 4.1—GEO

PROBABILITY OF A DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE AND AGE OF VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* CAPITAL STATUTE THROUGH 1977

Age and Race of Victim	Number of Victims	Number of Death Sentences	Probability of a Death Sentence
0-20 years			
White	179	19	.106
Black	341	6	.018
21-30 years			
White	404	13	.032
Black	844	4	.005
31-50 years			
White	620	11	.018
Black	994	2	.002
Over 50 years			
White	405	30	.074
Black	408	4	.010

Data Sources: (1) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (2) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

Table 3.2—GEO

PROBABILITY OF A DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE AND SEX OF VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* CAPITAL STATUTE THROUGH 1977

Sex and Race of Victim	Number of Felony Homicide Victims	Number of Death Sentences	Probability of a Death Sentence
Male			
White	323	44	.136
Black	171	7	.041
Female			
White	74	20	.270
Black	29	4	.138

Data Sources: (1) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (2) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

Table 2—TEX

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE OF OFFENDER AND VICTIM IN TEXAS FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	Estimated Number of Offenders [a]	Persons Sentenced to Death	Probability of a Death Sentence
White	411	34	.083
Black	294	27	.092
Race of Victim			
White	551	62	.114
Black	151	2	.013
Offender/Victim Racial Combinations			
Black Kills White	173	25	.144
White Kills White	378	34	.090
Black Kills Black	121	2	.016
White Kills Black	30	0	.000
All Offenders	705	61	.087

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1974 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reporting Bureau, Texas Department of Public Safety, Austin, Texas; (3) Vital Statistics records on willful homicides from January 1974 through December 1977, supplied by the Bureau of Vital Statistics, Texas Department of Health, Austin, Texas; (4) persons sentenced to death from January 1974 through December 1977, supplied by the Office of Court Administration, The Supreme Court of Texas, Austin, Texas.

[a] The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 2.473 equals the number of homicide victims from January 1974 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2). See Appendix A for a further discussion of the adjustment procedure.

Table 3.1—GEO

PROBABILITY OF A DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE AND SEX OF VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* CAPITAL STATUTE THROUGH 1977

Sex and Race of Victim	Number of Victims	Number of Death Sentences	Probability of a Death Sentence
Male			
White	1230	46	.037
Black	2010	9	.004
Female			
White	379	27	.071
Black	576	7	.012

Data Sources: (1) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (2) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

Table 5.1—GEO

PROBABILITY OF A DEATH SENTENCE FOR CRIMINAL HOMICIDE BY JUDICIAL CIRCUITS GROUPED REGIONALLY IN GEORGIA FROM THE EFFECTVE DATE OF ITS POST-*FURMAN* STATUTES THROUGH 1977

Regional Grouping of Georgia Judicial Circuits [a]	Number of Victims	Number of Death Sentences	Probability of a Death Sentence
North	289	2	.007
Central	1011	41	.041
Atlanta	1133	7	.006
Southwest	985	21	.021
Southeast	837	19	.023
All Regions	4255	90	.021

Data Sources: (1) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (2) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

[a] Regional Groupings include the following Circuits: North (Lookout Mountain, Conasauga, Blue Ridge, Mountain, Northeastern, Rome, Cherokee); Central (Tallapoosa, Cobb, Coweta, Griffin, Clayton, Stone Mountain, Gwinnett, Alcovy, Piedmont, Western, Ocmulgee, Northern, Toombs, Flint); Atlanta (Atlanta); Southwest (Chattahoochee, Macon, Houston, Southwestern, Pataula, Cordege, Tifton, Dougherty, South Georgia, Southern, Alapaha); Southeast (Augusta, Middle, Dublin, Ogeechee, Oconee, Atlantic, Eastern, Waycross, Brunswick).

Table 5.1—FLA

PROBABILITY OF A DEATH SENTENCE FOR CRIMINAL HOMICIDE BY JUDICIAL CIRCUITS GROUPED REGIONALLY IN FLORIDA FROM THE EFFECTIVE DATE OF ITS POST-*FURMAN* STATUTES THROUGH 1977

Regional Grouping of Florida Judicial Circuits [a]	Number of Victims	Number of Death Sentences	Probability of a Death Sentence
Panhandle	415	19	.046
North	980	31	.032
Central	1524	51	.033
South	1916	34	.018
All Regions	4835	135	.028

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

[a] Regional Groupings include the following Circuits: Panhandle (1, 2, 3 and 14); North (4, 5, 7 and 8); Central (6, 9, 10, 12, 13, 18, and 19); South (11, 15, 16 and 17).

Table 5.2—FLA

PROBABILITY OF A DEATH SENTENCE FOR FELONY-TYPE MURDER BY JUDICIAL CIRCUITS GROUPED REGIONALLY IN FLORIDA FROM THE EFFECTIVE DATE OF ITS POST-*FURMAN* STATUTES THROUGH 1977

Regional Grouping of Florida Judicial Circuits [a]	Number of Victims	Number of Death Sentences	Probability of a Death Sentence
Panhandle	31	18	.581
North	141	20	.142
Central	172	39	.227
South	269	29	.108
All Regions	613	106	.173

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

[a] Regional Groupings include the following Circuits: Panhandle (1, 2, 3 and 14); North (4, 5, 7 and 8); Central (6, 9, 10, 12, 13, 18, and 19); South (11, 15, 16 and 17).

Table 6.1—GEO

PROBABILITY OF A DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF VICTIM AND JUDICAL CIRCUITS GROUPED REGIONALLY IN GEORGIA FROM THE EFFECTIVE DATE OF ITS POST-*FURMAN* STATUTE THROUGH 1977

Regional Grouping of Georgia Judicial Circuits [a]	Number of Victims	Number of Death Sentences	Probability of a Death Sentence
North			
White	227	2	.009
Black	72	0	.000
Central			
White	482	33	.068
Black	529	8	.015
Atlanta			
White	300	5	.017
Black	833	2	.002
Southwest			
White	336	19	.057
Black	649	2	.003
Southeast			
White	292	17	.058
Black	546	2	.004

Data Sources: (1) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (2) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

[a] Regional Groupings include the following Circuits: North (Lookout Mountain, Conasauga, Blue Ridge, Mountain, Northeastern, Rome, Cherokee); Central (Tallapoosa, Cobb, Coweta, Griffin, Clayton, Stone Mountain, Gwinnett, Alcovy, Piedmont, Western, Ocmulgec, Northern, Toombs, Flint); Atlanta (Atlanta); Southwest (Chattahoochee, Macon, Houston, Southwestern, Pataula, Cordege, Tifton, Dougherty, South Georgia, Souther, Alapaha); Southeast (Augusta, Middle, Dublin, Ogeechee, Oconce, Atlantic, Eastern, Waycross, Brunswick).

Table 6.1—FLA

PROBABILITY OF A DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF VICTIM AND JUDICIAL CIRCUITS GROUPED REGIONALLY IN FLORIDA FROM THE EFFECTIVE DATE OF ITS POST-*FURMAN* STATUTE THROUGH 1977

Regional Grouping of Florida Judicial Circuits [a]	Number of Victims	Number of Death Sentences	Probability of a Death Sentence
Panhandle			
White	189	18	.095
Black	226	1	.004
North			
White	445	27	.061
Black	532	3	.006
Central			
White	842	48	.057
Black	677	3	.004
South			
White	972	29	.030
Black	936	4	.004

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

[a] Regional Groupings include the following Circuits: Panhandle (1, 2, 3 and 14); North (4, 5, 7 and 8); Central (6, 9, 10, 12, 13, 18, and 19); South (11, 15, 16 and 17).

Table 6.2—FLA

PROBABILITY OF A DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE OF VICTIM AND JUDICIAL CIRCUITS GROUPED REGIONALLY IN FLORIDA FROM THE EFFECTIVE DATE OF ITS POST-*FURMAN* STATUTE THROUGH 1977

Regional Grouping of Florida Judicial Circuits [a]	Number of Victims	Number of Death Sentences	Probability of a Death Sentence
Panhandle			
White	24	17	.708
Black	7	1	.143
North			
White	102	18	.176
Black	38	1	.026
Central			
White	138	37	.268
Black	34	2	.059
South			
White	191	25	.131
Black	76	3	.039

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

[a] Regional Groupings include the following Circuits: Panhandle (1, 2, 3 and 14); North (4, 5, 7 and 8); Central (6, 9, 10, 12, 13, 18, and 19); South (11, 15, 16 and 17).

Appendix A

ADJUSTMENT PROCEDURES FOR TEMPORAL AND CROSS-SECTIONAL UNDERCOVERAGE OF HOMICIDE OFFENDER DATA

For 1976 the Supplementary Homicide Reports compiled by local police agencies and filed with the Uniform Crime Reporting Section of the FBI were revised to include information on offenders as well as victims of criminal homicide in those cases where offenders or suspected offenders were arrested or known to the police. Since 1976, offender characteristics have been reported for roughly 85 percent of all homicide incidents or victims.

In most states, these Supplementary Homicide Reports are not compiled or filed with the FBI by all local jurisdictions, thus producing cross-sectional undercoverage of homicides.

Since these reports may not be filed by all local jurisdictions within a given state (cross-sectional undercoverage) and since the information on offenders is not reported prior to 1976 (temporal undercoverage) for all states, this data source will underestimate the number of homicide offenders since the effective date of post-*Furman* capital statutes in most states. To obtain adequate estimates of the numbers of homicide offenders arrested or known to the police during the effective periods of post-*Furman* capital statutes in the states under analysis, we must adjust for temporal and cross-sectional undercoverage.

Our adjustment for undercoverage of homicide offenders is based on full coverage homicide victim statistics. The Vital Statistics Program of the National Center for Health Statistics provides a virtually complete accounting of the victims of willful homicide in all states. Willful homicides as classified or defined by the Vital Statistics Program correspond quite closely to the UCR definition

or classification of criminal homicides. (Where coverage is complete for both data sources, the reported number of victims of homicide or homicide victims is very nearly the same, 95% on the average.)

Our victim-based adjustment factor is then the number of homicide victims in a state for the period to be studied divided by the number of homicide victims in that state for the period over which offender characteristics are available. Where the number of victims for the period of analysis is drawn from the Vital Statistics records or reports and the number of victims during the period for which offender data are available come the Supplementary Homicide Reports. The adjustment employed corrects for both temporal and cross-sectional undercoverage when the effective date of the post-*Furman* statute was earlier than 1976 and not all police agencies in the state consistently filed Supplementary Homicide Reports. Where a state has a post-1976 capital statute (as in Alabama) the adjustment is strictly for cross-sectional undercoverage; and where all police agencies in a state file Supplementary Homicide Reports (as in Florida) the adjustment is strictly for temporal undercoverage. In the latter case, homicide victim figures from the Supplementary Homicide Reports provide full coverage of homicide victims and are used in place of Vital Statistics figures to correct for temporal undercoverage.

It should be noted that this adjustment procedure assumes comparable arrest or suspect rates and offender/victim ratios for the time periods and geographical areas where offender data are missing or not available.

Appendix B

DATA SOURCES

Homicide data from crime reporting agencies

Homicide data for all states, 1973-1976: computerized Supplementary Homicide Reports, supplied by Paul Zolbe, Chief, Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.

Homicide data for Alabama 1977-1978: xeroxed copies of individual Supplementary Homicide Report forms supplied by Michael Devine, Chief, Uniform Crime Reporting Program, Criminal Justice Information Center, State of Alabama, 858 South Court Street, Montgomery, Alabama 36130.

Homicide data for Florida 1977: computerized Supplementary Homicide Reports, supplied by Alan Knudson, Bureau Chief, Uniform Crime Reports, Department of Law Enforcement, Post Office Box 1489, Tallahassee, Florida 32302.

Homicide data for Georgia 1977: xeroxed copies of individual Supplementary Homicide Report forms supplied by Jan Trace, Criminal Activity Reporting Unit, Georgia Bureau of Investigation, Georgia Crime Information Center, P.O. Box 1456, Atlanta, Georgia 30301.

Homicide data for Ohio 1977: computerized Supplementary Homicide Reports, supplied by Herman Slonecher, Data Systems Division Chief, Ohio Bureau of Criminal Identification, Post Office Box 365, Columbus, Ohio 43140.

Homicide data for Texas 1977: computerized Supplementary Homicide Reports, supplied by Cal Killingsworth, Manager, Uniform Crime Reporting Bureau, Texas Department of Public Safety, Post Office Box 4143, Austin, Texas 78765.

Homicide data from vital statistics agencies

Homicide data for Alabama 1976-1978: Vital Statistics figures, supplied by Robert Schiller, Chief Statistician, Division of Vital Statistics, State Department of Public Health, State Office Building, Montgomery, Alabama 36130.

Death sentence data from various sources

Death Sentences for Alabama: figures supplied by John Carroll, Southern Poverty Law Center, 1001 S. Hull Street, Montgomery, Alabama 36101.

Death Sentences for Florida: forms supplied by Kay Isley, Citizens Against the Death Penalty, 215 Washington Street, Jacksonville, Florida 32202.

Death Sentences for Georgia: forms supplied by Patsy Morris, Georgia Committee Against the Death Penalty, 88 Walter Street, N.W., Atlanta, Georgia 30303.

Death Sentences for Ohio: forms supplied by Steve Van Dine, Research Coordinator, Adult Parole Authority, 1050 Freeway Drive, N. Columbus, Ohio 43229.

Death Sentences for Texas: supplied by Eric Troseth, Office of Court Administration of the Texas Judicial System, 1414 Colorado St., Suite 600, P.O. Box 12066, Capitol Station, Austin, Texas 78711.

Appellate review data from court records

Life and death sentences reviewed by the Georgia Supreme Court, 1970-spring 1977: data collection instruments and card files of the Georgia Supreme Court obtained under subpoena and supplied by Millard Farmer, Team Defense, 15 Peachtree Street, Suite 831, Atlanta, Georgia.

Pre-*Furman* death sentence data from institutional files

Persons under the sentence of death at the time of the *Furman* decision in Florida: information coded

from the Florida Parole and Probation Commission manual records; access authorized by Charles Scriven, Chairman of the Florida Parole and Probation Commission, 1309 Winewood Blvd., Tallahassee, Florida 32301.

Persons under the sentence of death at the time of the *Furman* decision in Georgia: information coded from Georgia Board of Pardons and Paroles manual records; access authorized by the Board of Pardons and Paroles, 800 Peachtree St., Room 610, Atlanta, Georgia 30308.

Homicide data for Georgia, April 1973 to December 1977: computerized Vital Statistics records supplied by Anne Allen, Statistician, Office of Health Services and Statistics, Division of Physical Health, 47 Trinity Ave., S.W., Atlanta, Georgia 30334.

Homicide data for Ohio 1975-1977: Vital Statistics figures, supplied by Karl Wise, Chief, Division of Vital Statistics, Room 620, Ohio Departments Building, 65 South Front Street, Columbus, Ohio 43215.

Homicide data for Texas, 1973 to 1977: Vital Statistics tabulations supplied by Tom Pollard, Statistician, Bureau of Vital Statistics, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756.

Indictment through sentencing data from court records

First Degree Murder Indictment followed through sentencing for 20 Florida counties for 1973-1976: forms supplied by Kay Isley, Citizens Against the Death Penalty, 215 Washington Street, Jacksonville, Florida 32202.

Indictments at all levels followed through sentencing for 20 Florida counties, 1976-1977: forms supplied by Kay Isley, Citizens Against the Death Penalty, 215 Washington Street, Jascksonville, Florida 32202.

Post-conviction data from institutional records

Persons imprisoned for all degrees of criminal homicide for Florida 1973-1977: computerized records supplied by Jerry Smith, Chief of Research, Department of Offender Rehabilitation, 1311 Winewood Boulevard, Tallahassee, Florida 32301.

Persons imprisoned for all degrees of criminal homicide for Georgia, 1973-1977: computerized records supplied by Tim Carr, Chief of Statistics, Department of Offender Rehabilitation, 800 Peachtree Street, N.W., Atlanta, Georgia 30308.

Sample of persons imprisoned for all degrees of criminal homicide for Georgia, 1973-1977: information coded from Georgia Board of Pardons and Paroles manual records; access authorized by the Board of Pardons and Paroles, 800 Peachtree St., Room 610, Atlanta, Georgia 30308.

SUPREME COURT OF THE UNITED STATES

No. 84-6646

WILLIE LLOYD TURNER, PETITIONER

v.

ALLYN R. SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

May 13, 1985

STATUTORY PROVISIONS FROM CODE OF VIRGINIA

§ 18.2-31. Capital murder defined; punishment.—The following offenses shall constitute capital murder, punishable as a Class 1 felony:

(a) The willful, deliberate and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit;

(b) The willful, deliberate and premeditated killing of any person by another for hire;

(c) The willful, deliberate and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof;

(d) The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon;

(e) The willful, deliberate and premeditated killing of a person during the commission of, or subsequent to, rape;

(f) The willful, deliberate and premeditated killing of a law-enforcement officer as defined in § 9-108.1 H when such killing is for the purpose of interfering with the performance of his official duties; and

(g) The willful, deliberate and premeditated killing of more than one person as a part of the same act or transaction.

If any one or more subsections, sentences, or parts of this section shall be judged unconstitutional or invalid, such adjudication shall not affect, impair or invalidate the remaining provisions thereof but shall be confined in its operation to the specific provisions so held unconstitutional or invalid. (Code 1950, §§ 18.1-21, 53-291; 1960, c. 358; 1962, c. 42; 1966, c. 300; 1970, c. 648; 1973, c. 403; 1975, cc. 14, 15; 1976, c. 503; 1977, c. 478; 1979, c. 582; 1980, c. 221; 1981, c. 607; 1982, 636.)

§ 19.2-264.1. Views by juries.—The jury in any criminal case may, at the request of either the attorney for

the Commonwealth or any defendant, be taken to view the premises or place in question, or any property, matter or thing relating to the case, when it shall appear to the court that such view is necessary to a just decision. (Code 1950, § 8-216; 1977, c. 624.)

ARTICLE 4.1.

Trial of Capital Cases.

§ 19.2-264.2. Conditions for imposition of death sentence. —In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed. (1977, c. 492.)

§ 19.2-264.3. Procedure for trial by jury.—A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence of the defendant of the offense charged in the indictment, or any other offense supported by the evidence for which a lesser punishment is provided by law and the penalties therefor.

B. If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed, it shall fix the punishment for such offense as provided by law.

C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty, which shall be fixed as is provided in § 19.2-264.4.

If the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty. (1977, c. 492; 1983, c. 519.)

§ 19.2-264.4. Sentence proceeding.—A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (v) the age of the defendant at the time of the commission of the capital offense.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that

there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed ..... foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed ..... foreman"

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life. (1977, c. 492; 1980, c. 160.)

§ 19.2-264.5. Post sentence reports.—When the punishment of any person has been fixed at death, the court

shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate upon the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as provided in § 19.2-299. After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life. (1977, c. 492.)

OPINION OF THE COURT

SUPREME COURT OF VIRGINIA

Record No. 800375

WILLIE LLOYD TURNER

v.

COMMONWEALTH OF VIRGINIA

Nov. 26, 1980

Before I'ANSON, C. J., and CARRICO, HARRISON, COCHRAN, POFF, COMPTON and THOMPSON, JJ.

LAWRENCE W. I'ANSON, Chief Justice.

The defendant, Willie Lloyd Turner, was convicted of capital murder, Code § 18.2-31(d)[1]; possession of a sawed-off shotgun in the commission of a crime of violence (robbery), Code § 18.2-300(A); and the use of a firearm (a pistol) in the commission of a felony (murder), Code § 18.2-53.1. The jury fixed Turner's punishment at one year in the penitentiary for violating Code § 18.2-53.1 and life imprisonment for violating Code § 18.2-300(A). In the second stage of the bifurcated proceeding conducted pursuant to Code §§ 19.2-264.3 and -264.4, the jury fixed the defendant's punishment for capital murder at death.

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[1] Code § 18.2-31(d) provides that "[t]he willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon" constitutes a capital murder.

At the conclusion of a separate sentencing hearing conducted pursuant to Code § 19.2-264.5, the trial court sentenced the defendant to death for capital murder and sentenced him in accordance with the jury's verdicts on the other two offenses. The defendant is here for an automatic review of the death sentence, consolidated with his appeal from his several convictions. Code § 17-110.1.

I. FACTS

On July 12, 1978, at approximately 11:30 a.m., Willie Lloyd Turner, a black male, entered a jewelry store owned and operated by W. Jack Smith, Jr., a white male. In addition to Smith, an employee (Mary Huffman) and a customer were present when Turner entered the store. After entering the store, Turner displayed a sawed-off shotgun previously concealed by a towel and demanded money and jewelry. Smith, while placing money and jewelry into the store's jewelry bags, triggered a silent alarm alerting the police department.

Judith R. Cosby and Police Officer Alan D. Bain, having entered the store without knowing a robbery was in progress, were detained in the store by Turner. Having discovered Smith had triggered a silent alarm, Turner demanded that Smith turn off the alarm. After acceding to Turner's demand, Smith, along with Cosby, began placing additional valuables designated by Turner into jewelry bags.

Near the rear of the store, Turner examined a revolver taken from Bain and fired a bullet toward the rear wall. Turner stated if he saw or heard any additional police officers, he was going to start killing those in the store. About that time, Bain heard a siren. Turner then walked from the back of the store toward the middle of the store, where Smith was stationed behind a counter, and fired a bullet from the revolver at Smith without warning. Smith, with blood on his temple, slumped behind the counter. Bain began talking with

Turner, promising him to take him anywhere he wanted to go and asking him not to shoot again. While Bain talked with Turner, two occupants scrambled out the front door. After Turner told Bain he was going to kill Smith because he had triggered the silent alarm, Turner leaned over the counter and fired two bullets from the revolver into Smith's chest in rapid succession. Bain then grabbed and subdued Turner while Cosby ran out the front door. Smith died as a result of the bullets fired by Turner into Smith's chest.

II. JURY SELECTION AND SEQUESTRATION

Several of the defendant's assignments of error concern the manner in which voir dire was conducted. Over defense counsel's objections, the trial judge ruled that he alone would ask the questions of prospective jurors during voir dire. He also concluded that he would question jurors in groups of five, except when questioning jurors concerning their views on the death penalty. Although questioning concerning the death penalty occurred at least initially in groups of five, each prospective juror was required to answer individually at least two questions concerning capital punishment.[2] Prior to the day of trial, the court asked counsel for the Commonwealth and the defendant to submit questions they wished to have asked. Turner's counsel submitted a list of fifteen questions, nine of which were asked by the trial judge.

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[2] Jurors were asked variations of the following questions: "Do you have any religious or conscientious scruples or objections against the imposition of the death sentence?" and "Do you feel that in each and every case, regardless of the facts, where a person is convicted of murder he should receive the death penalty?" Those jurors answering no to both questions were deemed suitable, without further questioning, with respect to their attitude toward the death penalty. Those answering yes to either question were questioned further by the court.

A. REFUSAL TO ALLOW COUNSEL-CONDUCTED VOIR DIRE

The defendant contends that Code § 8.01-358 [3] gives both court and counsel an unconditional right to question prospective jurors directly and that the trial court abridged this statutorily created right by refusing to allow counsel-conducted voir dire. Citing Supreme Court Rule 3A:20(a),[4] the Commonwealth replies that the trial courts have discretion in determining whether to permit counsel-conducted voir dire.

The Constitution of Virginia, Art. VI, § 5, prohibits the promulgation of any court rule "in conflict with the general law as the same shall, from time to time, be established by the General Assembly." Supreme Court Rule 3A:20(a) clearly makes the right to counsel-conducted voir dire contingent upon the trial court's approval. In resolving the issue before us, we must determine whether Code § 8.01-358 confers upon attorneys the unconditional right to question prospective jurors directly. If Code § 8.01-358 confers such a right, it prevails over

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[3] Code § 8.01-358 provides: "The court and counsel for either party may examine under oath any person who is called as a juror therein and may ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case.

"A juror, knowing anything relative to a fact in issue, shall disclose the same in open court."

[4] Supreme Court Rule 3A:20(a) provides that following mandatory questioning by the court as to seven potential grounds for juror exclusion, "the court, or counsel with permission of the court, may examine on oath any prospective juror or may ask any question relevant to his qualifications as an impartial juror."

that portion of Rule 3A:20(a) which makes the exercise of that right contingent upon the trial court's approval.

The legislative history of § 8.01-358 is useful in discerning whether the General Assembly intended to confer such a right upon attorneys. The Code of 1887 § 3154 required trial courts to question prospective jurors when requested to do so by the litigants.[5] The Code of 1919 § 6000 enlarged a trial court's powers by providing that a court could question jurors even though not requested to do so by counsel.[6] The pertinent language remained unchanged for several decades. *See* Code of 1950 § 8-199 (1950). In 1966, the General Assembly amended Code § 8-199 to read as follows:

> "The court *and counsel for either party* may examine on oath any person who is called as a juror therein *and may ask such person or juror directly any relevant question* to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case."

Acts 1966, c. 496, at 676 (language added in 1966 italicized). On June 15, 1971, this court promulgated a comprehensive set of rules governing criminal practice and

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[5] Code of 1887 § 3154 provided, insofar as is pertinent, that "[t]he court shall, on motion of either party in any suit, examine on oath any person who is called as a juror therein, to ascertain" the juror's qualifications.

[6] Code of 1919 § 6000 provided, insofar as is perinent, that "[t]he court shall, on motion of either party in any suit, or may of its own accord," examine any prospective juror.

procedure, to be effective January 1, 1972. One of these rules was Rule 3A:20, which unambiguously gives the trial court discretion in determining whether to allow counsel-conducted voir dire. 211 Va. cvi (1971). Code § 8-199 was recodified as Code § 8-208.28 in 1973 without any change. Acts 1973, c. 439, at 651-52. In another recodification, the texts of Code §§ 8-215 (1957 Repl.Vol)[7] and 8-208.28 were combined to form the present text of Code § 8.01-358. Acts 1977, c. 617, at 1111.

As both parties recognize, we have not previously resolved whether the 1966 amendment to this statute confers upon attorneys an unconditional right to participate directly in voir dire. In *Harmon v. Commonwealth*, 209 Va. 574, 166 S.E.2d 232 (1969), we held that when a litigant's attorney has agreed that the judge alone would ask the voir dire questions, he or she cannot require the trial judge to exercise that right in a particular fashion. In upholding Harmon's conviction, we concluded that the statutory *permission* for the court to ask such questions directly does not *require* a court to do so. Thus, the trial court was permitted, but not required as contended by Harmon, to question jurors individually. In regard to voir dire conducted by counsel, we noted that the propounding of questions by the trial judge, and not by counsel for the defendant, was "in accordance with the usual practice." 209 Va. at 579, 166 S.E.2d at 236. We also concluded that the word "may" "is not mandatory but permissive and leaves the matter to the discretion of the trial court." 209 Va. at 580, 166 S.E.2d at 236.

Prior to the 1966 amendment, the litigants' counsel had no authority whatsoever for directly participating in voir dire examinations. "Although the statute formerly required the judge alone to ask the questions, in practice most trial courts *permitted* counsel to ask them di-

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[7] Code § 8-215 (1957 Repl.Vol.) provided: "A juror, knowing anything relative to a fact in issue, shall disclose the same in open court."

rectly." Boyd, *Practice and Pleading—The Twelfth Annual Survey of Virginia Law: 1966, 1967*, 53 Va.L. Rev. 1763, 1781 (1967) (emphasis added). The 1966 amendment "sanction[ed] this deviation and [brought] Virginia in line with the procedure in other jurisdictions." *Id.* Thus, the amendment authorized what was already in fact occurring: counsel's participation in voir dire when permitted by the trial court.

Cognizant that the statutory language might be subject to different interpretations, this court in 1971 promulgated Rule 3A:20(a) of the Rules of Criminal Practice and Procedure. This Rule, which clearly makes counsel's participation in voir dire contingent upon the trial court's approval resolved any ambiguity present in the statutory language.

Turner suggests that, even if Code § 8.01-358 confers no unconditional right to counsel-conducted voir dire, the trial court abused its discretion in refusing to allow defense counsel to question prospective jurors directly and in not questioning each prospective juror out of the presence of other jurors. While the defendant has a constitutional right to a fair and impartial jury, he has no constitutional right to counsel-conducted voir dire. *See, e.g., United States v. Duke*, 409 F.2d 669, 671 (4th Cir. 1969), *cert. denied*, 397 U.S. 1062, 90 S.Ct. 1497, 25 L.Ed.2d 683 (1970). In the absence of a statute or court rule to the contrary, as long as the selection procedure results in a fair and impartial jury, the manner in which a jury is to be selected is properly within the trial court's sound discretion. Thus, the trial court's refusal to question jurors individually out of the presence of other prospective jurors and the court's refusal to allow counsel-conducted voir dire do not represent an abuse of discretion. *See Dean v. Commonwealth*, 209 Va. 666, 669, 166 S.E.2d 228, 230 (1969). We have carefully examined the voir dire conducted by the trial judge and believe it resulted in a fair and impartial jury. Under

such circumstances, we cannot say the trial judge abused his discretion.

B. REFUSAL TO ASK SPECIFIC QUESTIONS PROPOSED BY DEFENSE COUNSEL

As noted previously, the trial court refused to ask several questions proposed by defense counsel.[8] Turner contends that the failure to ask these questions constituted prejudicial error.

The pre-1966 text of what is now Code § 8.01-358 provided that "[t]he court shall, on motion of either party in any suit, examine" jurors to ascertain their qualifications concerning impartiality and lack of bias. The 1966

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[8] Of the fifteen questions submitted by defense counsel, one question was withdrawn, nine were asked by the trial judge, and five were refused. These five questions were:

"(10) The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?

(11) Do you feel that if a person is to be given the death penalty for the unlawful killing of another person, such penalty should be given only if such killing is of the most severe and aggravated nature?

(13) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty?

(14) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty if there is a probability that the person would commit criminal acts of violence that would constitute a continuing threat to society?

(15) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty if his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder?"

amendment deleted this requirement, providing merely that "the court . . . may examine [a prospective juror] and may ask [such juror] any relevant question." In *Harmon v. Commonwealth*, 209 Va. at 580, 166 S.E.2d at 236, we held that this statutory language "is not mandatory but permissive and leaves the matter to the discretion of the trial court." With the exception of seven questions, all of which were asked in this case, Rule 3A:20(a) makes voir dire questioning entirely discretionary with the trial court. Unless the refusal to ask a question amounts to a denial of due process or otherwise impinges upon the right to a fair and impartial jury, *see, e.g., Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973), the present wording of Code § 8.01 358 and Rule 3A:20(a) empowers a trial court to use its discretion in determining whether to ask questions proposed by either the Commonwealth or the defendant.

The trial court's refusal to ask the questions proposed by defense counsel did not impinge upon the defendant's right to a fair and impartial jury. While "the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant," a trial court's refusal to do so is not constitutionally objectionable in the absence of factors similar to those in *Ham*.[9] *Ristaino v. Ross*, 424 U.S. 589, 597 n.9, 96 S.Ct. 1017, 1022 n.9, 47 L.Ed.2d 258 (1976). The mere fact that a defendant is black and that a victim is white does not constitutionally mandate such an inquiry. *Lewis v. Commonwealth*, 218 Va. 31, 35-36, 235 S.E.2d 320, 323 (1977). The refusal of the

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[9] Turner introduced a study indicating that black defendants killing white victims receive the death penalty more frequently than black defendants killing blacks, whites killing blacks, or whites killing whites. The study, however, was based upon statistics compiled in other states and thus was of little utility in establishing the potential of prejudice in Virginia.

trial court to ask other questions, those concerning the circumstances under which a prospective juror would vote for the death penalty, likewise is not constitutionally objectionable. The voir dire questioning conducted by the trial judge probed many of the areas touched upon by these questions and assured the removal of those who would invariably impose capital punishment. The court's instructions to the jury clearly delineated the circumstances in which the death penalty could be imposed. Since the questioning actually conducted by the court preserved the defendant's right to a fair and impartial jury, the trial court's refusal to ask the voir dire questions proposed by defense counsel was not an abuse of discretion.

C. EXAMINATION OF PROSPECTIVE JURORS CONCERNING ATTITUDES ABOUT CAPITAL PUNISHMENT

For the reasons stated in *Waye v. Commonwealth*, 219 Va. 683, 690-91, 251 S.E.2d 202, 207, *cert. denied*, 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979), we reject Turner's contention that the trial court should not have questioned prospective jurors concerning their willingness to impose capital punishment

We likewise believe that the trial court properly struck Samuel Cypress from the venire. After asking Cypress variations of the questions asked of others on the panel,[10]

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[10] The complete examination of Cypress appears below:

"THE COURT: Now, Mr. Cypress, do you have any religious or conscientious scruples or objections against the imposition of the death penalty?

MR. CYPRESS: Well, really, I don't go for the death penalty.

THE COURT: Can you say yes or no to that question?

MR. CYPRESS: No.

THE COURT: Or yes?

MR. CYPRESS: Do I have any objection?

THE COURT: Yes.

[Continued]

the trial judge concluded that Cypress' objections to capital punishment were absolute. While jurors may not be excluded "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction," *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 1777, 20 L.Ed. 2d 776 (1968), those jurors irrevocably committed to voting against the death penalty may be excluded. *Coppola v. Commonwealth*, 220 Va. 243, 250, 257 S.E. 2d 797, 802 (1979), *cert. denied*, 444 U.S. 1103, 100 S.Ct. 1069, 62 L.Ed.2d 788 (1980); *Smith v. Commonwealth*, 219 Va. 455, 464, 248 S.E.2d 135, 141 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979). The trial court's determination that a juror is irrevocably committed to voting against the death penalty will not be disturbed on appeal unless we can say the prospective juror's commitment against the death penalty was not "unmistakably clear." *Smith v. Commonwealth*, 219 Va. at 465, 248 S.E.2d at 141. *Accord, Coppola v. Commonwealth*, 220 Va. at 250, 257 S.E.2d at 802. On the basis of the answers given by Cypress, the trial court reasonably concluded he was irrevocably committed against the death penalty.

D. SEQUESTRATION OF THE JURY

Turner sought and obtained a change of venue from Southampton County to Northampton County. Upon learning of a recent Northampton County case involving

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[10] [Continued]

MR. CYPRESS: Yes.

THE COURT: Is your objection to the death penalty absolute?

MR. CYPRESS: Well, I would say yes.

THE COURT: Could you in a proper case impose the death penalty?

MR. CYPRESS: Didn't hear.

THE COURT: Could you in a proper case impose the death penalty?

MR. CYPRESS: Well, I can't see where it helps any."

the death penalty and another murder in the area, defense counsel moved for another change in venue and for sequestration of the jury, both of which were denied. Turner contends that the refusal to sequester the jury was prejudicial error.

As Turner's counsel notes, a judge has discretion in determining whether to sequester a jury. The mere fact of media coverage does not require a judge to sequester a jury. *Thompson v. Commonwealth*, 219 Va. 498, 247 S.E.2d 707 (1978). A trial judge's discretion regarding sequestration extends to cases involving capital punishment. We hold that, in the absence of any indication of pretrial prejudicial publicity, a trial judge has wide discretion in deciding whether to sequester a jury.

III. CONSTITUTIONALITY OF THE DEATH PENALTY PROVISIONS

A. FACIAL CONSTITUTIONALITY

Turner contends that Virginia's statutory provisions concerning the death penalty are facially unconstitutional for reasons previously rejected by us. *See Martin v. Commonwealth*, 221 Va. 436, 440, 271 S.E.2d 123, 126 (1980); *Mason v. Commonwealth*, 219 Va. 1091, 1094-95, 254 S.E.2d 116, 118-19 (1979); *Waye v. Commonwealth*, 219 Va. 683, 698-99, 251 S.E.2d 202, 211 (1979); and *Smith v. Commonwealth*, 219 Va. 455, 476-79, 248 S.E.2d 135, 148-49 (1978). We reaffirm these prior holdings concerning the facial constitutionality of the death penalty statutory provisions.

Turner also argues that the imposition of the death penalty on the basis of a jury's conclusion regarding a defendant's propensity for future crime is unconstitutional.[11] The statutory objective of isolating a criminal,

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[11] Turner does not contend that the jury had no basis for concluding he would probably commit "criminal acts of violence that

according to Turner, can be accomplished through the less drastic measure of life imprisonment. As Turner acknowledges, *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), upheld as constitutional a Texas statute allowing the imposition of the death penalty where a jury determines, *inter alia*, the defendant would probably commit "criminal acts of violence that would constitute a continuing threat to society." 428 U.S. at 269, 96 S.Ct. at 2955. While the only issue explicitly addressed concerning a defendant's propensity for future criminal conduct was whether the jury was being asked to resolve a question beyond its competency, 428 U.S. at 274-76, 96 S.Ct. at 2955-2958, we believe *Jurek* holds that a defendant's propensity for future criminal acts of violence is an acceptable consideration in determining whether to impose the death penalty. *See also Gregg v. Georgia*, 428 U.S. 153, 183 n.28, 96 S.Ct. 2909, 2930 n.28, 49 L.Ed.2d 859 (1976) (plurality opinion).

B. CONSTITUTIONALITY AS APPLIED

Citing *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), Turner contends there was insufficient evidence to support a conclusion that his conduct in committing the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery." Code § 19.2-264.2. As we noted in (*James Dyral*) *Briley v. Commonwealth*, —— Va. ——, 273 S.E.2d 57 (1980), *Godfrey* rested upon its unique facts. The *Godfrey* prosecutor conceded the defendant had not tortured the victims or committed an aggravated battery upon

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would constitute a continuing serious threat to society . . . ." Code § 19.2-264.2. Since 1974, the defendant, has been convicted of malicious maiming, escape, unlawful wounding, malicious wounding, and second-degree murder. Four of these offenses occurred in the penal system.

them. 100 S.Ct. at 1763. Godfrey had no prior criminal record. Thus, the death sentence rested upon the jury's finding that Godfrey's actions had been "outrageously or wantonly vile, horrible or inhuman in that [they] involved . . . depravity of mind." 100 S.Ct. at 1767. Rejecting such a conclusion as unconstitutional, the Supreme Court of the United States noted several facts: Godfrey's victims, family members who had caused him "extreme emotional trauma," were killed instantaneously; and shortly after the killings Godfrey acknowledged his involvement and the heinous nature of his crimes. *Id.* Godfrey's crimes were not deemed to reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." *Id.* In summary, the state had not proven "a principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id.*

The second clause of Code § 19.2-264.2 (hereafter, the "vileness" clause) provides specific criteria which must be met before the death penalty can be imposed on the basis of this clause. The conduct in committing the offense must be deemed to be "outrageously or wantonly vile, horrible or inhuman." Code § 19.2-264.2. Second, the jury must conclude that the conduct establishes one of the following: torture of the victim, an aggravated battery of the victim, or the perpetrator's depravity of mind. *See Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980).

In the present case, the Commonwealth established that Turner's conduct was "outrageously or wantonly vile, horrible or inhuman." Turner first shot Smith in the head without warning. After Smith slumped behind the counter, Bain immediately pleaded with Turner not to fire any more. After the defendant had fired one bullet hitting the rear wall and another one hitting Smith's head, Cosby became nauseous and asked if she could be seated. Rejecting Bain's pleas, Turner then leaned over the counter and fire two bullets into

Smith's chest. While Smith was slumped behind the counter, Cosby heard him "gurgling." The evidence also establishes Turner committed an "aggravated battery": a "battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978). After being wounded by Turner, Smith slumped helplessly behind the counter. Unlike Godfrey's victims, Smith did not die instantaneously from a single discharge of a firearm.

Virginia's death penalty statute authorizes the imposition of the death penalty if either the "dangerousness" or "vileness" standard is met. Even if Turner's crime did not meet the "vileness" standard, imposition of the death penalty would be permissible under the "dangerousness" standard.[12] On the basis of Turner's prior criminal record, set forth in footnote 11, the jury could reasonably conclude that the defendant would probably "commit criminal acts of violence that would constitute a continuing serious threat to society." Code § 19.2-264.2.

IV. REFUSAL TO INSTRUCT THE JURY CONCERNING MURDER IN THE COMMISSION OF AN ATTEMPTED ROBBERY

Code § 18.2-31(d), as noted earlier, provides that murder "in the commission of robbery" while armed with a deadly weapon is capital murder. Code § 18.2-32 pro-

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[12] As in *(James Dyral) Briley v. Commonwealth*, —— Va. ——, 273 S.E.2d 57 (this day decided), the jury returned a sentencing verdict without (striking out the inapplicable language ("and" or "or"). Unlike in *Briley*, however, the trial judge in Turner's case refused to ask the jury members, either individually or collectively, whether their sentencing verdict was grounded upon the "dangerousness" or "vileness" standard or both. While the trial judge's refusal was not prejudicial error, it would accord with better practice to determine with certainty the basis for the jury's sentence. Such a procedure would greatly facilitate the process of appellate review.

vides that murder "in the commission of, or attempt to commit," robbery is first-degree murder. Whereas Code § 18.2-32 is violated by a murder in an attempted robbery, Code § 18.2-31(d) is not. To be convicted under Code § 18.2-31(d), the defendant must have committed a robbery.

Turner contends that the jury should have been instructed concerning the lesser offense of first-degree murder because the evidence failed to establish the commission of a robbery. While Turner never had physical possession of the jewelry bags personally, we believe the requirement of asportation has been satisfied in this case. "This degree of asportation necessary to constitute a taking under the common law definition of robbery need be only slight." *Durham v. Commonwealth*, 214 Va. 166, 168, 198 S.E.2d 603, 606 (1973). A perpetrator exercises dominion and control over an object where he commands another to seize the object and the person complies. In this case, Turner at gunpoint commanded Smith and Cosby to place money and valuables into jewelry bags owned by the store. Placing the money and valuables into the bags as requested, Smith and Cosby then put the bags on the counter. Turner exercised dominion and control over the money and valuables when Smith and Cosby asported these items at his command.

V. DOUBLE JEOPARDY

Citing *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980), Turner contends that the Double Jeopardy Clause of the United States Constitution [13] was violated when he was convicted of the use of a firearm in the commission of a felony, Code § 18.2-

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[13] U.S. Const., amend. V, provides that no one in a criminal case "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb."

53.1,[14] as well as murder in the commission of a robbery "while armed with a deadly weapon," Code § 18.2-31(d). In *Busic*, the Supreme Court held that 18 U.S.C. § 924 (c), providing enhanced punishment for one using or carrying a firearm [15] in the commission of a felony, could not be applied to a defendant using a firearm in the course of a felony that is proscribed by a statute which itself authorizes enhancement if a deadly weapon is used. Both *Busic* and its precursor, *Simpson v. United States*, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978), were based upon a determination of Congressional intent.

The constitutional prohibition of double jeopardy consists of three separate guarantees: (1) "It protects against a second prosecution for the same offense after acquittal. [(2)] It protects against a second prosecution for the same offense after conviction. [(3)] And it protects against multiple punishments for the same offense." *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 2264, 65 L.Ed.2d 222 (1980) quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656

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[14] Code § 18.2-53.1 provides that: "It shall be unlawful for any person to use or attempt to use any pistol, shotgun, rifle, or other firearm or display such weapon in a threatening manner while committing or attempting to commit murder, rape, robbery, burglary, malicious wounding as defined in § 18.2-51, or abduction. Violation of this section shall constitute a separate and distinct felony and any person found guilty thereof shall be sentenced to a term of imprisonment of one year for a first conviction, and for a term of three years for a second or subsequent conviction under the provisions of this section. Notwithstanding any other provision of law, the sentence prescribed for a violation of the provisions of this section shall not be suspended in whole or in part, nor shall anyone convicted hereunder be placed on probation. Such punishment shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony."

[15] Firearm, as defined in 18 U.S.C. § 921, includes a number of destructive devices not generally deemed to be firearms. *See Simpson v. United States*, 435 U.S. at 10, n.4, 98 S.Ct. at 911, n.4.

(1969). In determining whether a defendant has been twice convicted for the "same offense," U.S.Const., amend. V, courts have been guided by the test set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932): "[T]he test to be applied to determine whether there are two offenses or only one, is whether each [statutory] provision requires proof of a fact which the other does not."

We need not resolve whether one convicted of the use of a firearm in the commission of a felony (Code § 18.2-53.1) and murder in the commission of a robbery while armed with a deadly weapon [Code § 18.2-31(d)] has been convicted twice for the "same offense" under the *Blockburger* test.[16] As noted earlier, the defendant's convictions stem from a single criminal trial. Consequently, only the third constitutional guarantee (the guarantee against multiple punishments) is at issue in this appeal. The constitutional guarantee against multiple punishments "is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977). Where two or more punishments for separate

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[16] The statutory provisions at issue in this case are similar to those at issue in *Wayne County Prosecutor v. Recorder's Court Judge*, 406 Mich. 374, 280 N.W.2d 793 *appeal dismissed for want of a substantial federal question sub nom., Brintley v. Michigan*, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979) (use of a firearm in the commission of a felony and robbery "while armed with a dangerous weapon.") Under *Hicks v. Miranda*, 422 U.S. 332, 343-45, 95 S.Ct. 2281, 2288-2290, 45 L.Ed.2d 223 (1975), the Supreme Court's dismissals for want of a substantial federal question are dispositive precedent for those issues presented in a petitioner's appeal. In light of our conclusion concerning the significance of legislative intent on the issue before us, it is unnecessary to determine whether the Supreme Court's dismissal for want of a substantial federal question adjudicated whether felony-firearm and robbery "while armed with a dangerous weapon" constituted the same offense under *Blockburger*.

statutory violations are imposed in a single criminal proceeding, "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to impose." *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 1441, 63 L.Ed.2d 715 (1980) (Blackmun, J., concurring).

The General Assembly has clearly indicated its intent to impose multiple punishments for capital murder and use of a firearm in the commission of a felony. Code § 18.2-53.1 provides that a "[v]iolation of this section shall constitute a separate and distinct felony" and that the punishment imposed for violating Code § 18.2-53.1 "shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony." This language reflects an unambiguous intent to authorize multiple punishment for a single criminal transaction. Thus, Turner's double jeopardy claim has no merit.

VI. REVIEW REQUIRED BY CODE § 17-110.1

Code § 17-110.1(C)(1) requires that we consider and determine whether the death sentence "was imposed under the influence of passion, prejudice or any other arbitrary factor." We have carefully considered the record in this case and find no indication that the death sentence was the product of these enumerated factors.

Code § 17-110.1(C)(2) requires us, after "considering both the crime and the defendant," to determine whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases." We have reviewed death sentences in those cases involving murder in the commission of a robbery while armed with a deadly weapon. (*James Dyral*) *Briley v. Commonwealth*, —— Va. ——, 273 S.E.2d 57 (1980); (*Linwood*) *Briley v. Commonwealth*, —— Va. ——, 273 S.E.2d 48 (1980); *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808

(1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980); *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979), *cert. denied*, 444 U.S. 1103, 100 S.Ct. 1069, 62 L.Ed.2d 788 (1980). While the atrociousness involved in Turner's murder does not rise to the level evidenced in *Stamper*, (*James Dyral*) *Briley*, or *Coppola*, Turner's murder is just as brutal as the murders in (*Linwood*) *Briley* and *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979), *cert. denied*, 444 U.S. 1049, 100 S.Ct. 741, 62 L.Ed.2d 736 (1980). Moreover, the defendant's criminal record, detailed in footnote 11, is one of the most extensive we have reviewed under Code § 17-110.1(C). Turner, unlike any of the other defendants except for Mason,[17] had been convicted for a previous murder. Certainly his prior criminal record is as extensive or more extensive than the criminal records of those other defendants sentenced to death for murder in the commission of an armed robbery. Having considered "both the crime and the defendant," Code § 17-110.1 (C)(2), we conclude the death sentence is not excessive or disproportionate to the sentences imposed in similar cases.

VII. OTHER ASSIGNMENTS OF ERROR

For the reasons stated in (*James Dyral*) *Briley v. Commonwealth*, *supra*, and (*Linwood*) *Briley v. Commonwealth*, *supra*, we reject Turner's contention that a further change in venue was necessary. We likewise reject his argument that photographs of the victim and crime scene should not have been introduced into evidence. *Waye v. Commonwealth*, 219 Va. at 692, 251 S.E. 2d at 207-08. Moreover, Turner's contention that the jury should have been given an instruction concerning

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[17] *Mason v. Commonwealth*, 219 Va. 1091, 254 S.E.2d 116, *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979).

the possibility of parole has no merit. *Stamper v. Commonwealth*, 220 Va. at 278, 257 S.E.2d at 821; *Clark v. Commonwealth*, 220 Va. at 214, 257 S.E.2d at 792.

Turner raises several other assignments of error, discussed neither in his brief nor in oral argument. After examining each of these assigned errors, we conclude that they have no merit and require no further discussion.

Having given the defendant's case both appellate and independent review, we conclude there is no reversible error in either his convictions or sentences, and we find no other reason to disturb or commute his death sentence. Therefore, we affirm the judgments pronounced by the trial court.

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 83-501-N

WILLIE LLOYD TURNER, #95190, PETITIONER

v.

GARY BASS, SUPERINTENDENT, ET AL., RESPONDENTS

[Filed May 23, 1984]

MEMORANDUM ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner is a prisoner in the Virginia penal system.

Petitioner is being detained pursuant to a judgment of the Circuit Court of Southampton County, Virginia of February 19, 1980, wherein petitioner was convicted of capital murder, use of a firearm in the commission of murder, and possession of a sawed off shotgun in the commission of robbery. He was sentenced to respective sentences of death, one year in the penitentiary, and a life term in the penitentiary. The death sentence was imposed in a separate hearing from the trial on guilt or innocence as is required in Va. Code §§ 19.2-264.3 and 19.2-264.4 (1950). These convictions arose out of events occurring on July 12, 1978, during which petitioner shot and killed the proprietor of a jewelry store in Franklin, Virginia.

Petitioner appealed his convictions to the Supreme Court of Virginia. On November 26, 1980, that Court issued a written opinion in which it affirmed petitioner's conviction in all respects.

* * * *

(f) Petitioner argues that execution by means of electrocution constitutes cruel and unusual punishment. This argument is contrary to the decision of the Supreme Court and is thus without merit. *In Re Kemmler*, 136 U.S. 436 (1890); *Gregg v. Georgia*, 428 U.S. at 170, 178; *See also Gray v. Lucas*, 710 F.2d 1048, 1060 (5th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 211 (1983).

Voir Dire

Petitioner has alleged that the *voir dire* conducted at his trial was flawed in several respects.

The trial judge conducted the *voir dire*, using certain of the questions which counsel for both sides had submitted to him. The prospective jurors were called forward in groups of five while the remainder were excluded from the courtroom. Those five were first asked, as a group, to respond to several questions. Each prospective juror was then asked individually as to his or her feelings concerning the death penalty. These responses were elicited for the purpose of "death-qualifying" the jury, a process approved in *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Adams v. Texas*, 448 U.S. 38 (1980). The Supreme Court in *Witherspoon* held that those prospective jurors who express an absolute opposition to the death penalty may be excluded from service as jurors in a capital murder case. The trial court struck for cause three jurors who expressed an absolute opposition to the imposition of the death penalty. (The trial court also struck several prospective jurors who stated that they

believed that the death penalty was the appropriate punishment for anyone convicted of murder.)

The petitioner argues that there was error both in the type of questions asked and in the manner in which the *voir dire* was conducted. Each complaint will be dealt with below.

(a) Petitioner's first assignment of error involves the death qualification of the jury as authorized in *Witherspoon*. Petitioner argues that the death qualification process yields a venire which does not represent a cross-section of the community and a jury which is conviction-prone. Petitioner has offered to produce data which, he contends, will establish the truth of his assertions. While the arguments which petitioner made at the earlier proceedings were less fully developed than they now appear to be, this Court will consider petitioner's present arguments in their entirety.

The Fourth Circuit has spoken twice on this issue. First, one of the petitioner's claims in *Barfield v. Harris*, 719 F.2d 58 (4th Cir. 1983) was identical to the argument now made by petitioner in the case at bar. In *Barfield*, the Fourth Circuit affirmed the district court's decision to deny relief to *Barfield* on this claim. *Barfield v. Harris*, 540 F.Supp. 451, 464 (E.D.N.C. 1982). Second, the petitioner in *Hutchins v. Woodard, et al.*, No. 84-8050, slip op. (4th Cir. March 13, 1984) sought a certificate of probable cause to appeal and a stay of execution on the same ground that Turner pursues here. The Fourth Circuit declined to grant the certificate and the stay. In the lead opinion, Judge Murnaghan wrote, *inter alia*, that Hutchins did not have a decided or substantial chance of prevailing on the merits of this issue. *See, Barefoot v. Estelle*, —— U.S. ——, 103 S.Ct. 3383 (1984). It appears to this Court that Judge Phillips may have reached a similar conclusion. It is important to note that the decision in *Hutchins* followed the issuance of the opinion in *Keeten, et al. v. Garrison*, 578 F.Supp. 1164 (W.D.N.C. 1984) in which Judge McMillan found

merit in the same argument which petitioner now makes to this Court. Although the Fourth Circuit made quite clear its desire that *Hutchins* was not to be considered *res judicata or stare decisis* on this issue, this Court reads the opinions of Judges Murnaghan and Phillips as indicating their belief that the view expressed in *Keeten* will probably not prevail in this Circuit.

Moreover, a significant number of courts which have treated this issue have disagreed with the position taken by petitioner, *e.g.*, *Corn v. Zant*, 708 F.2d 549 (11th Cir. 1983); *Smith v. Balkcom*, 660 F.2d 573; *Spinkellink v. Wainwright*, 578 F.2d 582. While it is true that two district courts recently have found merit in petitioner's claim, *Keeten*, 578 F. Supp. 1164; *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983), this Court is impressed with the reasoning of those cases which reject petitioner's arguments. Indeed, the decisions of these courts establish that, even assuming the validity of the social science data which petitioner would proffer to substantiate his claim, *see*, *Keeten*, 578 F.Supp. 1164; *Grigsby*, 569 F.Supp. 1273, petitioner's argument must fail. Accordingly, the Court adopts the reasoning in *Spinkellink*, 578 F.2d at 591-99, and concludes that petitioner is not entitled to relief as to this claim. *See also*, *Barfield*, 540 F.Supp. at 464. In addition, this Court concludes that an evidentiary hearing on this claim is not warranted. *See*, *Townsend v. Sain*, 372 U.S. 293 (1963).

(b) As discussed above, the trial judge questioned the prospective jurors individually in order to ascertain if any one should be excluded on *Witherspoon* grounds. Petitioner has argued that Samuel Cypress was improperly struck from the jury because, according to petitioner, Cypress did not express an unequivocal opposition to the death penalty. However, the Court finds petitioner's argument to be without merit.

According to the principles announced in *Witherspoon*, a juror may not be excluded merely because he or she

objects to the death penalty. *Witherspoon* provides for the exclusion of those prospective jurors,

> . . . who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them . . .

Id. at 522-23, n.21 (emphasis in original); *Adams v. Texas*, 448 U.S. 38.

At the conclusion of Cypress' individual *voir dire*, the trial court granted the Commonwealth's motion and excused Cypress for cause. Tr. at 91 (December 3, 1979). While the rule in *Witherspoon* and *Adams* is clear, there is no magic formula by which a trial judge can determine who is properly excludible. Therefore, it becomes important for the trial judge to gauge a prospective juror's demeanor and manner of responding to the questions. As a result, trial judges are generally given a great deal of discretion in evaluating juror impartiality. *Darden v. Wainwright*, 699 F.2d 1031 (11th Cir. 1983). Moreover, this Court must defer to the factual finding made by the state court on this issue. 28 U.S.C. § 2254 (d); *Sumner v. Mata*, 449 U.S. 539 (1981).

This Court is satisfied that the trial judge acted properly in excusing Cypress from service on the jury. Throughout the *voir dire*, the judge demonstrated a familiarity with the principles embodied in *Witherspoon* and *Adams*. In questioning Cypress, the trial judge carefully followed up Cypress' initial, and somewhat equivocal, response. The judge received answers which he felt required that Cypress be removed for cause. In sum, this Court refuses to accede to petitioner's request that we second guess the finding of the trial judge on this matter.

(c) Petitioner has complained that his counsel was denied the opportunity to conduct *voir dire*, in violation

of petitioner's Sixth and Fourteenth Amendment rights. At trial, petitioner's counsel timely requested that they be permitted to conduct, in whole or in part, the *voir dire* of the prospective jurors. The trial judge denied counsel's motion and conducted the entire *voir dire* himself.

On direct appeal, the Supreme Court of Virginia settled any question as to the trial court's authority to conduct the *voir dire* under Va. Code § 8.01-358 and Supreme Court Rule 3A:20; *Turner v. Commonwealth*, 273 S.E.2d 36. Naturally, this Court defers to the interpretation of Virginia law provided by the Virginia Supreme Court. *Wicker v. National Surety Corporation*, 330 F.2d 1009, 1012 (4th Cir. 1964), *cert. denied*, 379 U.S. 838 (1964).

Petitioner contends, however, that this procedure deprived him of his constitutional right to a fair trial. In *United States v. Duke*, 409 F.2d 669 (4th Cir. 1969), *cert. denied*, 397 U.S. 1062 (1970), the Fourth Circuit held that Rule 24 of the Federal Rules of Criminal Procedure is constitutional, including that aspect of the Rule which permits the trial court to conduct the *voir dire*. The Court concluded that there were substantial reasons for permitting the trial court to conduct *voir dire*. These reasons are even more compelling in the *Witherspoon* context where the trial judge must decide whether a prospective juror is unequivocally opposed to the death penalty. In such a situation, where a person's conscience and moral beliefs must be probed, it might be preferable for the judge himself, as an impartial party, to conduct the *voir dire*. Indeed, there is the possibility that counsel for either side could, through their questions, confuse or prejudice the prospective jurors. In sum, the trial judge's decision to conduct the *voir dire* did not infringe any of petitioner's constitutional rights.

(d) Petitioner has also complained that the trial court deprived him of a fair trial by refusing to permit indi-

vidual *voir dire*, to ask prospective jurors as to their racial attitudes and to probe their understanding of the presumption of innocence. Petitioner's argument fails.

The trial judge retains wide discretion in determining the way in which *voir dire* will be conducted. *Ristaino v. Ross*, 424 U.S. 589, 594 (1976); *Aldridge v. United States*, 283 U.S. 308 (1931). As noted above, the trial judge chose to question the jurors individually as to their feelings regarding the death penalty, although the other questions were asked of the jurors as a group. The decision as to whether, and to what extent, the prospective jurors should be questioned individually falls squarely within the ambit of the judge's discretion. This Court finds no reason, of a constitutional dimension, to upset the trial judge's decision to conduct the *voir dire* as he did.

This Court also will not disturb the trial court's decision not to question jurors as to their racial attitudes. The Supreme Court considered this issue in *Ristaino*, 424 U.S. 589. In *Ristaino*, the Court held that defendant was not entitled to have prospective jurors questioned about racial prejudice because the facts in that case "did not suggest a signficant likelihood that racial prejudice might infect [defendant's] trial." *Id.* at 598. *Compare, Ham v. South Carolina*, 409 U.S. 524 (1973) (black defendant was civil rights activist asserting defense that he was "framed"). In *Ristaino*, unlike in *Ham*, racial issues were not "inextricably bound up with the conduct of the trial." *Ristaino* at 596. The Court further stated that the mere fact that the defendant was black and the victim was white did not require the trial court to inquire as to the racial attitudes of the prospective jurors. *Id.* at 597.

In the case at bar, petitioner has not shown that an investigation of the racial attitudes of prospective jurors was necessary as racial issues are not inextricably bound up with the facts at trial. And as in *Ristaino*, the fact that petitioner is black and his victim was white did

not entitle petitioner to have such questions asked. (Petitioner has cited *Rosales-Lopez v. United States*, 451 U.S. 182 (1981) as support for his position. However, that case does not, in any way, affect the conclusion reached by this Court. The plurality opinion in *Rosales-Lopez*, joined in this respect by Justices Burger and Rehnquist, reiterates that the *Ristaino* standard is to be used to determine when the *Constitution* requires that the racial attitudes of prospective jurors be investigated. *Id.* at 189-90.)

Finally, petitioner has argued that the trial judge never inquired as to the ability of the prospective jurors to understand and apply the presumption of innocence. There is no merit to this contention. The trial judge asked all prospective jurors whether they had "formed any opinion with regard to the guilt or innocence" of the petitioner. E.g. Tr. at 47 (December 3, 1979). None of the prospective jurors indicated that they had done so. There was, therefore, no need for the trial judge to inquire further. In light of the deference to be accorded the trial judge, this Court sees no constitutional infirmity with the way the judge handled the *voir dire*.

(e) Finally, the petitioner has argued that he has a constitutional right to meaningful *voir dire* so that he may make intelligent preemptory challenges. Petitioner claims this right was infringed here. However, the Constitution does not guarantee petitioner a right to exercise peremptory challenges at all. *Swain v. Alabama*, 380 U.S. 202, 219 (1966); *see, United States v. Rucker*, 557 F.2d 1046 (4th Cir. 1977).

The trial judge gave petitioner the opportunity to exercise peremptory challenges. Petitioner has not shown that he was unable to exercise them properly. Moreover, as discussed above, the trial judge has much discretion in conducting the *voir dire*. This Court concludes, after reviewing the record, that the *voir dire* did not impermissibly infringe the petitioner's exercise of the peremptory challenges he was allotted.

* * * *

OPINION OF THE COURT

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 84-4004

WILLIE LLOYD TURNER, APPELLANT

v.

GARY BASS, SUPERINTENDENT, APPELLEE

Argued Oct. 2, 1984

Decided Jan. 25, 1985

J. Lloyd Snook, III, Charlottesville, Va. (Paxson, Smith, Gilliam & Scott, Charlottesville, Va., on brief), for appellant.

Robert H. Anderson, III, Asst. Atty. Gen., Richmond, Va. (Gerald L. Baliles, Atty. Gen. of Va., Richmond, Va., on brief), for appellee.

Before WIDENER, HALL and PHILLIPS, Circuit Judges.

WIDENER, Circuit Judge:

In December 1979 Willie Lloyd Turner was tried by a jury in Northampton County, Virginia and found guilty of capital murder.[1] Pursuant to Va.Code § 19.2-264.4, the jury sentenced Turner to death. Turner unsuccessfully appealed his conviction and sentence to the

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[1] Turner was indicted in Southampton County, Virginia. A motion for a change of venue was granted and he was tried in Northampton County.

Virginia Supreme Court. *Turner v. Commonwealth*, 221 Va. 513, 273 S.E.2d 36 (1980). The United States Supreme Court denied Turner's petition for a writ of certiorari. 451 U.S. 1011, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981).

Turner then filed a petition for a writ of habeas corpus in the circuit court of Southampton County, Virginia. That petition was denied. The Virginia Supreme Court affirmed that denial. The United States Supreme Court once again denied Turner's petition for a writ of certiorari. —— U.S. ——, 103 S.Ct. 2465, 77 L.Ed.2d 1341 (1983).

Turner next sought relief in the federal courts. On July 27, 1983, he filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, raising numerous constitutional issues.[2] That petition was amended on March 20, 1984. The petition was initially denied on May 23, 1984, and a motion to alter or amend that judgment was denied July 19, 1984. The district court issued a certificate of probable cause, thus allowing Turner to appeal the denial of habeas corpus relief. This denial serves as the basis of the present appeal.[3] We affirm.

A brief summary of the facts leading to Turner's conviction are necessary for an understanding of the issues presented. On July 12, 1978, Turner entered Smith Jewelers in Franklin, Virginia, armed with a sawed-off shotgun, and demanded that the store owner W. Jack Smith give him money and jewelry. A store employee and a customer were also present in the store at the time. Another customer entered during the robbery. Smith set off the store's silent alarm, and momen-

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[2] Turner has exhausted his state remedies as required by *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

[3] Turner's execution date was set for September 19, 1984. On August 28, 1984, this court entered a stay pending further order of this court.

tarily police officers A.D. Bain arrived on the scene and inquired about the activation of the alarm. Bain's pistol was taken by Turner. Turner then told Smith to turn the alarm off and keep filling bags with jewelry.

Turner soon became concerned that other police officers would respond to the alarm. He then fired a pistol shot into the back of the store. Officer Bain tried to assure Turner that no other policemen would be answering the alarm. Without any warning and with no provocation, Turner then shot store owner, Smith, in the head. The shot in the head did not kill Smith. It passed through his scalp, but apparently not through the skull. It caused bleeding on the coverings of the brain and bruised the brain's surface. Smith slumped and then fell helplessly to the floor. Officer Bain pleaded with Turner not to shoot anyone else, and offered to take Turner anywhere that he wanted to go. Turner then stated that he was "going to kill . . . [Smith] for snitching on [him]." He then shot Smith, who was then still living, helpless and "gurgling," twice in the chest. One of these shots was in the lungs, one in the heart. Officer Bain was then able to disarm and subdue Turner. Smith died of the wounds in his chest.

I

We turn now to the several issues raised on appeal. First, Turner contends that the district court erred in upholding the trial court's refusal to permit examination of the jury on voir dire concerning racial prejudice. He contends that because he is black and the murder victim was white the trial court should have questioned jurors about the existence of racial prejudice, and that his constitutional rights to a fair trial were violated by the court's refusal.[4]

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[4] Turner's counsel requested that the jurors be asked the following:

> The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or

A criminal defendant such as the defendant here has a constitutional right under the Sixth and Fourteenth Amendments to the Constitution to be tried by an impartial jury. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). This does not entitle the defendant, however, to examine jurors on voir dire about every matter that may prejudice a juror against the defendant. But, where special circumstances exist, a criminal defendant may have a constitutional right to have veniremen questioned on racial prejudice. *Ristaino v. Ross*, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976).

The Supreme Court found such special circumstances in *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973). Ham, a black man, was convicted in a South Carolina court of possession of marijuana. His defense at trial was that he was framed by law enforcement officials because of his civil rights activities. Ham was known throughout the community for his civil rights work. The trial court refused to question the jurors about possible racial prejudice against Ham. The Court found a due process violation in the trial court's failure to interrogate the jurors on the issue of racial bias.

Three years after its decision in *Ham*, the Supreme Court refused to create a per se rule requiring voir dire on racial prejudice in any case where the defendant is of a different race from the victim. *Ristaino v. Ross*, *supra*. Ross, a black male, was tried in a Massachusetts court for armed robbery, assault and battery with a dangerous weapon and assault and battery with the intent to commit murder. The victim was a white security guard. The Court rejected the court of appeals' decision that such voir dire should be required because the case involved a violent crime committed by a black against a white security guard. Such a holding, the

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affect your ability to render a fair and impartial verdict based solely on the evidence?

Court said, interpreted *Ham* too broadly. *Ham* represented a fact specific situation in which racial issues were "inextricably bound up with the conduct of the trial." *Ristaino, supra*, 424 U.S. at 597, 96 S.Ct. at 1021. The Court concluded that the mere fact that the victim was white and the defendant was black was less likely to distort the trial than were the special factors present in *Ham*. "The circumstances did not suggest a significant likelihood that racial prejudice might infect Ross' trial." 424 U.S. at 598, 96 S.Ct. at 1022. Thus, voir dire on racial prejudice was not constitutionally mandated.

Turner contends that his case involves special circumstances requiring voir dire on racial prejudice because he is charged with capital murder and that in and of itself is a special circumstance. He also contends that defendants who murder whites are more likely to be sentenced to death and therefore a special circumstance is created by this likelihood.

We reject both contentions. There must exist some special circumstance in the facts surrounding a particular case before such voir dire is constitutionally required. We are of opinion that the nature of the crime or punishment itself is not a special circumstance. Nor is the fact that the victim is white and the defendant black, as *Ristaino* specifically so held. We are also of opinion that the fact that a larger percentage of white victims' assailants are executed than are other races is not a special circumstance. "There is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups." *Rosales-Lopez*, infra, 451 U.S. at 190, 101 S.Ct. at 1635.

An even more recent pronouncement from the Supreme Court involving a Mexican defendant confirms that "[o]nly when there are more substantial indications [than a victim of one race and the defendant of another or a defendant of any particular race] of the likelihood of racial or ethnic prejudice affecting the jurors in a

particular case does the trial court's denial of a defendant's request to examine the juror's ability to deal impartially with the subject amount to an unconstitutional abuse of discretion." *Rosales-Lopez v. United States*, 451 U.S. 182, 190, 101 S.Ct. 1629, 1635, 68 L.Ed.2d 22 (1981).

The broad inquiry in each case must be ". . . whether under all of the circumstances presented there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be 'indifferent as [they stand] unsworne.'" *Ristaino*, 424 U.S. at p. 596, 96 S.Ct. at p. 1021. An examination of all of the circumstances presented here does not indicate there was a constitutionally significant likelihood that absent questioning about racial prejudice the jurors would not be indifferent as they stood unsworn. As Turner concedes, there is nothing special in the facts surrounding this case to suggest racial antagonism. That being true, the trial court did not commit constitutional error by refusing to ask the jurors the question copied in footnote 4 in the margin.

II

Turner next contends that the exclusion of juror Samuel Cypress for cause violated his Sixth and Fourteenth Amendment rights. Cypress was struck for cause over defense objections after the following colloquy:

> Now, Mr. Cypress, do you have any religious or conscientious scruples or objections against the imposition of the death penalty?
>
> Mr. Cypress: Well, really, I don't go for the death penalty.
>
> The Court: Can you say yes or no to that question?
>
> Mr. Cypress: No.
>
> The Court: Or yes?

Mr. Cypress: Do I have any objection?

The Court: Yes.

Mr. Cypress: Yes.

The Court: Is your objection to the death penalty absolute?

Mr. Cypress: Well, I would say yes.

The Court: Could you in a proper case impose the death penalty?

Mr. Cypress: Didn't hear.

The Court: Could you in a proper case impose the death penalty?

Mr. Cypress: Well, I can't see where it helps any.

Turner argues that Cypress' responses do not show that he was irrevocably committed before trial to vote against the death penalty. In particular, Turner challenges the Virginia court's interpretation of Cypress' response that he did not see that it helped any when queried about whether he could impose the death penalty.

In *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and again in *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), the Court held that the State may strike for cause jurors whose opposition to the death penalty would prevent them from considering all the penalties provided by state law. That opposition must be such as to lead the juror to either ignore the law or violate his oath as a juror. The fact that a juror may be opposed to the death penalty does not provide grounds to strike him for cause as long as he would consider imposition of the death penalty in an appropriate case.

In this case, the state trial judge, after questioning Cypress and observing his demeanor, determined that cause existed to strike him from the jury panel. The

district court refused to disturb the trial judge's findings, and we agree.

Under 28 U.S.C. § 2254(d), factual findings such as those of a state trial court [5] are presumed to be correct in a habeas corpus action in federal court unless among other things not applicable here, those determinations are not fairly supported by the record. That standard applies to our consideration of Cypress' qualification to serve on the jury. In *Patton v. Yount*, —— U.S. ——, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984), a case involving the partiality of a juror, much the same question as that presented here, the Court decided that, on habeas corpus review, when the question was whether or not a juror could set aside an opinion, the presumption of § 2254(d) applied, and that "special deference" should be given to the finding of the trial court. The Court held that the juror in question was properly seated despite some ambiguous answers, much as here. "Jurors thus cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially." at ——, 104 S.Ct. at 2893.

The question we must address therefore is whether there is fair support in the record for the trial court's conclusion that Cypress' opposition to the death penalty was absolute. We hold that the record supports that conclusion. Cypress stated that he opposed imposition of the death penalty. Following further questioning, Cypress said that this opposition was absolute. While his response to the trial judge's last question may have been ambiguous, such ambiguity has been resolved by the trial judge whose ". . . resolution of such questions is entitled, even on direct appeal, to special deference." at ——, 104 S.Ct. at 2892. The trial judge asked the proper questions re-

[5] The trial court's finding was specifically affirmed by the Virginia Supreme Court. 273 S.E.2d at p. 43.

quired by *Witherspoon* and *Adams*. He was in the best position to observe Cypress' demeanor and intonation during voir dire. We refuse to disturb his decision that Cypress' opposition to the death penalty was absolute.

We do not construe *Keeten v. Garrison*, 742 F.2d 129 (4th Cir., 1984), to require us to make a de novo review of Cypress' qualification to serve on the jury, as Turner argues. Rather, we think it is consistent with *Patton*. But, assuming arguendo Turner's construction of *Keeten*, our holding would be the same. The trial judge could have reasonably concluded, after considering Cypress' responses in toto that he could not consider imposition of the death penalty in the proper circumstance, and we think his finding is supported by the record.

III

As Turner notes in his brief, this court's recent opinion in *Keeten* precludes his argument that his constitutional right to an impartial jury was violated because a death qualified jury is claimed to be biased in favor of the prosecution. *Keeten* was recently reaffirmed by this court in *Briley v. Booker*, (1984).

IV

Turner claims error in the district court's denial of an evidentiary hearing on his claim that he was denied effective assistance of counsel at the penalty phase of his trial. He does not claim ineffective assistance at the stage of the trial ascertaining guilt or innocence. The district court found that Turner's trial was not a case in which counsel had failed to present any evidence, or only evidence of marginal value, and concluded that Turner's attorneys had presented evidence of his psychological history and mental state at the time of the murder, which are matters in mitigation specifically included in Virginia Code § 19.2-264.4. It concluded that counsel had complied with the standard set out in *Marzullo v. Mary-*

land, 561 F.2d 540 (4th cir. 1977), cert. den. 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978), and that no evidentiary hearing was required. We agree.

When a habeas petitioner presents facts which, if proved, would entitle him to habeas corpus relief, a federal court can receive that evidence at a hearing. *Townsend v. Sain*, 372 U.S. 293, 312, 83 S.Ct. 745, 756, 9 L.Ed.2d 770 (1963). An evidentiary hearing in a federal habeas corpus proceeding is required only if the habeas as petitioner establishes one or more of the enumerated criteria of 28 U.S.C. § 2254(d) or in *Townsend*, supra, at 312-318, 83 S.Ct. at 756-759. *Shaw v. Martin*, 733 F.2d 304 (4th Cir. 1984). Where a state court has decided the merits of a claim but made no express findings of fact, the district court may be able to reconstruct those findings without a hearing. Of course no hearing is required if the facts alleged by the petitioner and assumed to be true are insufficient to support a claim.

On appeal, Turner confines himself wholly to the defense attorneys' treatment of the psychological evidence at the penalty stage of the trial, if we include the side claim that the attorneys did not produce "the corroborating evidence necessary to make credible a psychological or mitigating defense." To place this contention in proper perspective, a brief review of the claim is in order. Following Turner's conviction, he employed other counsel to prosecute his appeal. These are the same attorneys who are presently in the case. They have represented Turner at least since May 1980, the date of filing of Turner's brief in the Supreme Court of Virginia in the appeal of the criminal conviction.

Following affirmance of Turner's conviction, he filed a petition for habeas corpus in the state court. So far as concerns us here, the only pertinent contention there made was that "counsel failed to develop and present adequately the psychiatric evidence sufficient to support a finding of the presence of mitigating mental abnormalities." That petition was dismissed and no written elucidation or ex-

planation of the contention was ever brought to the attention of the trial court prior to its order of February 10, 1982, dismissing the petition. On April 6, 1982, however, Turner's attorneys filed a paper with the trial court giving their version of the statement of facts, including what took place at the hearing. The Commonwealth did likewise. On June 3, 1982, the trial judge signed a statement of facts which included the fact that at oral argument petitioner's attorneys had proffered that the defense attorneys had not consulted any psychiatrist other than Dr. Bransfield and that the defense attorneys had not adequately researched capital murder statutes in other jurisdictions regarding the definition and application of the mitigating factors set forth in Virginia Code § 19.2-264.4B. This latter finding, however, does not concern us here in view of the course the trial and this appeal have taken. The Virginia Supreme Court denied a petition for appeal from the trial court's dismissal of the habeas corpus petition on January 11, 1983. In that order it relied on *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), and *Marzullo*, supra. The Supreme Court of the United States denied certiorari, —— U.S. ——, 103 S.Ct. 2465, 77 L.Ed.2d 1341 (1983).

Next, Turner applied for federal habeas corpus relief in the district court in the Eastern District of Virginia in the case at hand. In his petition, the allegations quoted above from the petition in the state court were copied *in haec verba*. That petition was likewise dismissed. The first time that any mention was ever made in this case of any missing witness with respect to the sentencing phase of the case, or failure to consult another psychiatrist, or any other failure with respect to the treatment of the psychiatric evidence, was when a motion was made on July 2, 1984 to alter or amend the judgment of the district court. At that time it was claimed that the defense attorneys should have called Turner's younger sister, his uncle, and two people who would say that they were will-

ing to back Turner in opening a barber shop after release from prison. Also, Turner then filed his affidavit seeking to explain the circumstances surrounding his earlier crimes, together with some documents corroborating some good incidents in his career while imprisoned.

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland v. Washington*, —— U.S. ——, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). It is by that standard that Turner's attorneys are to be measured.

So, we examine the attorneys' actions with respect to the psychiatric testimony. To begin with, they moved the court that they be permitted to employ a private psychiatrist to examine Turner. The court instead appointed a certain Dr. W.F. Daughtrey, Jr., a general practitioner, to examine and evaluate Turner and to make a report in writing to the court and to the attorneys in accordance with then effective § 19.2-169 of the Code of Virginia. Dr. Daughtrey reported that in his opinion Turner was mentally competent to stand trial. Being of opinion, however, that more extensive examination, evaluation and observation was desirable, the court then committed Turner to Central State Hospital, a mental hospital, for additional examination, evaluation and observation. The hospital was ordered to report to the court and to the attorneys, which it did. While there, Turner underwent psychiatric, psychological and sociological evaluation by the staff. The report from Central State Hospital was that Turner suffered from personality disorders and anti-social personality, each mild. It recommended that he be returned to the court for disposition of the pending charges. Turner's attorneys persisted, however, that Turner needed further examination, and the court ordered that the attorneys be permitted to employ Dr. Bransfield.[6] Dr.

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[6] We note that the orders for the various psychiatric examinations of Turner were entered by the General District Court before Turner was indicted. In Virginia, the General District Court in the usual

Bransfield, after examination of Turner and after psychological testing by Dr. Erwin F. Sacks, PhD and one of Dr. Bransfield's associates, submitted a long and detailed report to the effect that Turner was competent to stand trial. While Dr. Bransfield did not feel that Turner had schizophrenia, he was of opinion that a few psychiatrists would diagnose Turner as having latent schizophrenia. He also was of opinion that Turner in times of stress might display paranoid tendencies but that Turner had not shown a paranoid psychosis. He also thought that Turner had an anti-social personality and was not under an irresistible impulse at the time of the murder.

At the sentencing phase, Turner called one of the psychiatrists who had examined him, Dr. Bransfield, as well as his mother, his cousin and his aunt. He also called Officer Bain and the police chief. The officers were obviously called to prove that Turner was placed in a position of stress upon finding out that the silent alarm had been set off and upon the appearance of Officer Bain. The family witnesses, of course, had good things to say about Turner, how he was good to his family and had had a very disadvantaged childhood. His mother also testified, in corroboration of Dr. Bransfield, that at or about the time of the shooting she had had to call the local police about an incident at home and that she had told the police that Turner needed treatment for his mind. She said that he had been in a daze and that she was afraid that he might hurt somebody if they would push him. Dr. Bransfield had testified that if Turner believed he was cornered he might react in a violent way and he felt that if Turner had had treatment at the time of the shooting that Smith would not have been killed.

Dr. Bransfield, all in all, was quite a good witness for Turner. The gist of his testimony is contained in one of his answers on cross-examination:

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course of things has jurisdiction to ascertain probable cause and decide whether a defendant will be bound to a grand jury. Circuit Courts are the trial courts of general jurisdiction.

> "He had psychotic symptoms which were present for at least three weeks before July 12th [the day of the murder]. I could list what those symptoms are. They seemed to influence his behavior. I could not prove—there was no evidence that I could show that his shooting Mr. Smith was fully and completely a psychotic act; however, I do feel that he was affected by psychotic problems which impaired his ability to perform in a rational manner and the symptoms that he had, I could list."

Earlier, the conclusion of Dr. Bransfield's direct examination was as follows:

> Q . . . [D]o you have an opinion with reasonable medical certainty as to whether this crime was committed while Willie Turner was under the influence of extreme mental or emotional disturbance?
>
> A Yes, I do have an opinion.
>
> Q And what is that opinion, sir?
>
> A That I feel he was under the influence of mental disturbance while he was committing the crime.

Thus, Dr. Bransfield's testimony tended to show one of the facts which may tend to show mitigation specifically mentioned in the Virginia statute, "the influence of extreme mental or emotional disturbance," and also touched upon another like statutory factor, "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." See Va.Code § 19.2-264.4. In view of Dr. Bransfield's testimony, it is seen that the contention in both petitions for habeas corpus, that the attorneys "failed to develop and present adequately the psychiatric evidence sufficient to support a finding of the presence of mitigating mental abnormalities," is little better than frivolous. The evidence was there for the jury to consider. The jury simply chose not to found its verdict upon that mitigating circumstance.

The claim now made on appeal is that Turner's attorneys "mishandl[ed]" "the psychiatric testimony and mitigating evidence" which was "essentially a product of ignorance." The claim goes that the attorneys "did not know the diagnostic implications or the potential dangers from cross examination of a diagnosis of anti-social personality;" they "had not discussed with Dr. Bransfield the definitions of the mitigating and aggravating circumstances on which he would be expected to comment;" and "did not acquire the degree of expertise in psychiatric matters necessary to fully develop the psychiatric defense."

The record belies the charges. The attorneys had caused three examinations of Turner, the preliminary examination by a general practitioner and two by psychiatric experts. While we are not told what are the diagnostic implications or potential dangers from cross examination of a diagnosis of an anti-social personality, the attorneys were obviously prepared to have more than one psychiatrist testify, for they so advised the court in the record. Dr. Bransfield's testimony was as good as it could have been. We think Turner's attorneys, in handling the psychiatric defense, did a professional job in every sense of the word. They had a good witness who testified as favorably in Turner's behalf as could have been wanted. Their examination of the witness was conducted in a skillful and knowledgeable manner. We are thus of opinion that their performance in Turner's behalf was reasonable under prevailing professional norms. Turner's present reliance on other possible theories of defense are nothing more than afterthoughts, we think, brought into play after the best defense, that of direct evidence on the direct question involved, had been tried but found wanting through no fault of the attorneys. The question of Turner's state of mind and the degree of his responsibility for his acts at the time of the shooting was purely a jury question. By its verdict the jury simply found that the mitigating factors were insufficient, a matter entirely

within its province. No fault of any kind can be laid to the attorneys for this result.[7]

V

Turner challenges the use of the vileness criterion in this case as being violative of his rights under the Eighth and Fourteenth Amendments to the Constitution.

Under Virginia law the death penalty may be imposed upon a defendant if the jury finds beyond a reasonable doubt that "there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society; [the dangerousness criterion] *or* that his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim" (the vileness criterion) Va.Code § 19.2-264.4C (emphasis added).

The Virginia Supreme Court has construed the vileness component of § 19.2-264.4C to include three separate and distinct features, those being torture, depravity of mind or aggravated battery. Proof of only one of these factors is sufficient to support a sentence of death. *Bunch v. Commonwealth*, 225 Va. 423, 432, 304 S.E.2d 271 (1983). Even more importantly, the Virginia Court has also given a limiting construction to two components of the vileness criterion. Depravity of mind has been construed to mean "a degree of moral turpitude and physical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." Aggravated battery is "a battery which qualitatively and quantitatively is more

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[7] With respect to the claim that the attorneys should have shopped around for another psychiatrist, we have excluded that ground in *Barfield v. Harris*, 719 F.2d 58, 63 (4th Cir. 1983), affirming 540 F.Supp. 451 (E.D.N.C. 1982), and we do not think the claim has any validity here.

culpable than the minimum necessary to accomplish an act of murder." *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135, 149 (1978).

The jury here was given a verdict form setting out both statutory aggravating factors (dangerousness and vileness) connected by the conjunctive "and/or". The jury unanimously imposed a sentence of death,[8] returning the verdict form without striking either the "and" or the "or".[9] Thus, this case differs from *Briley v. Bass*, 742 F.2d 155 (4th Cir. 1984), where the jury struck the word "or" and unanimously found both aggravating factors. There, the court did not need to consider a similar constitutional attack on the vileness criterion of § 19.2-264.4C because the dangerousness criterion was sufficient. *Briley* at pp. 165-166. Because we cannot be sure which factor the jury relied upon in awarding the death sentence in this case, we consider Turner's attacks on the vileness criterion.[10]

---

[8] The jury verdict read as follows:

> "We, the Jury, on the issue joined, having found the defendant guilty of Capital Murder of W. Jack Smith, Jr., as charged in the Indictment, and having found that, after consideration of his past criminal record that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and/or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind; aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death."

[9] We agree with the Virginia Supreme Court that the better practice would be for the trial court to poll the jury as to which aggravating factor they found. *Turner*, supra, 273 S.E.2d at 45 n. 12.

[10] Turner does not challenge the dangerousness criterion. There is ample evidence in the record to support such a verdict. *Turner*, supra, 273 S.Ed.2d at 44 n. 11 and 273 S.E.2d at 45.

Turner does not attack the constitutionality of this aggravating factor on its face, as that issue has been disposed of in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct 2909, 49 L.Ed.2d 859 (1976). Instead, he attacks its constitutionality as applied to him, relying upon *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion).

In *Godfrey* the Supreme Court reversed the imposition of the death penalty in a capital murder case because the Georgia vileness criterion was unconstitutionally applied to the defendant. Godfrey had been having marital problems with his wife of 28 years. He had a history of a drinking problem and violent behavior toward his wife. Godfrey's wife had left him and had filed suit for divorce. His attempts at reconciliation were rebuffed. Mrs. Godfrey moved in with her mother, who Godfrey felt encouraged the separation.

One evening immediately after arguing with his wife over the telephone, Godfrey took his shotgun and walked a short way to his mother-in-law's home. He peered through the window and saw his wife, his 11 year old daughter, and his mother-in-law. He immediately shot his wife in the forehead, killing her instantly. He then entered the trailer and struck and injured his daughter. He then fired one shot at his mother-in-law, hitting her in the head and killing her instantly. Godfrey immediately called the police, surrendered and confessed to the murders. 446 U.S. 424-426, 100 S.Ct. 1763-1764.

Godfrey was found guilty of two counts of murder and one count of aggravated assault. He was sentenced to death under Georgia's statute providing as aggravating circumstances that the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." [11] At the sentencing stage of trial, the

[11] This language is identical to that of Va.Code § 19.2-264.4C.

prosecutor conceded that the case did not involve torture or aggravated battery. The jury found that "the offense of murder was outrageously or wantonly vile, horrible or inhuman." The Georgia Supreme Court affirmed the imposition of the death penalty.

The Supreme Court reversed. The Court first noted that a State's sentencing scheme must provide "a meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Id. at 427, 100 S.Ct. at 1764, quoting *Furman v. Georgia*, 408 U.S. 238, 313, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 (White, J. concurring). The sentencer must be given clear and objective standards to follow in the application of the death penalty. Those "specific and detailed" guidelines enable the courts to rationally review the sentence imposed.

The Court found no such guidance present in *Godfrey*. Nothing in the words "outrageously or wantonly vile, horrible or inhuman" alone distinguished this murder from others not eligible for the death penalty. The Court reached this conclusion after reviewing Georgia case law giving the phrase a limited construction that required a demonstration that the offense involved torture, depravity of mind or aggravated battery. Depravity of mind had been defined in Georgia to mean the state of mind leading to torture or aggravated battery. But in Godfrey's case the prosecution had conceded that no torture or aggravated battery was present. Thus, the murders did not fit within the limiting criteria set out by the Georgia Supreme Court.

The Court held in *Godfrey* that the phrase "outrageously or wantonly vile, horrible or inhuman" in and of itself had not been given a constitutional construction by the Georgia Supreme Court. The Court concluded that "[t]he petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder. His victims were killed instantaneously. They were members of his family

who were causing him extreme emotional trauma. Shortly after the killings, he acknowledged his responsibility and the heinous nature of his crimes." Id. 446 U.S. at 433, 100 S.Ct. at 1767.

On direct appeal, the Virginia Supreme Court rejected Turner's argument that *Godfrey* required reversal of his death sentence. It construed the statute to require not only outrageously or wantonly vile, horrible or inhuman conduct, but also that such conduct involve either torture, an aggravated battery of the victim, or the perpetrator's depravity of mind. The Court then found, applying its limiting precedent of *Smith v. Commonwealth*, that the evidence established an aggravated battery which is a " 'battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish the act of murder.' " 248 S.E.2d at 149; 273 S.E.2d at 45. The court then found that, in all events, the dangerousness criterion of the statute had been met. Turner had been convicted previously of malicious maiming, escape, unlawful wounding, malicious wounding, and second degree murder, four of the offenses occurring while he was in prison. The validity of this finding is not questioned on appeal.

We agree with the analysis by the Virginia Supreme Court. The fatal weakness in *Godfrey* was the unconstitutionally broad construction given the vileness criterion in the absence of both torture and aggravated battery by the Georgia Supreme Court. That weakness is not present here. The Virginia Supreme Court has given a limited construction to the vileness criterion and applied that limited construction here.

We also note that the facts of this case are not even similar facts to those upon which the Supreme Court relied in *Godfrey*. In contrast, the murder here was cold-blooded and calculated, involving no element of emotional trauma as was present in *Godfrey*. Turner initially shot Smith for no reason at all. While Smith lay alive but helpless and while Officer Bain pleaded, Turner fired two

shots into Smith's chest after stating that he was going to kill him for snitching on him. No comparison can be drawn between the facts of *Godfrey* and the deliberate malicious murder presented in this case. We reject Turner's contention that his crime was not so vile as to justify the imposition of death. The case fits within the constitutionally limited construction of the vileness criterion established by the Virginia Supreme Court, and we are of opinion Virginia's death penalty provisions were constitutionally applied.

On a related subject, we find no constitutional deficiency in the instructions given to the jury at the sentencing stage of the trial. The instructions set out the appropriate mitigating factors of § 19.2-264.4, and the jury was also instructed as to the limiting definition of aggravated battery as expressed in *Smith*. The trial judge carefully instructed the jury that "[w]here the evidence is susceptible to two interpretations, one consistent with the imposition of the death penalty, and the other with the imposition of life imprisonment, you should not adopt that interpretation which is consistent with imposition of the death penalty." We do not think that *Godfrey* requires that a jury be instructed on each term in the aggravating circumstances. We see no reason why this jury should not have understood the terms of the instructions given. *Cape v. Francis*, 741 F.2d 1287 (11th Cir.1984).

The constitutional flaw of *Godfrey*, the Georgia Court's failure to give a constitutional construction to the vileness criterion, is not present here. The Virginia Court has limited the breadth of the criterion in such a manner that its application here was neither arbitrary nor capricious.[12] The jury was properly instructed. Nothing else was constitutionally required.

---

[12] The Virginia Supreme Court has consistently applied the limiting provisions of *Smith v. Commonwealth*, supra, in its review of cases involving the death penalty. *Stockton v. Commonwealth*, 227 Va. 124, 314 S.E.2d 371 (1984) (aggravated battery and de-

VI

While deliberating on the sentence to be imposed, the jury returned and asked the judge what life imprisonment entailed. The judge responded that the jury must consider only the two alternatives set out in the instructions, those being death or life imprisonment.

Turner contends that the due process requires that the jury be instructed that a prisoner may be entitled to parole and that the parole board is permitted to grant parole only after finding that the prisoner's release will serve his interests and the interests of society.

It is settled that such an instruction is not permissible under Virginia law. *Clark v. Commonwealth*, supra; *Hinton v. Commonwealth*, 219 Va. 492, 247 S.E.2d 704 (1978).

In *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), the Court upheld as constitutional a California law requiring that a jury in a capital case be instructed of the governor's power to commute a sentence of life without the possibility of parole. The Court made clear that while such disclosure is constitutionally permissible it is not constitutionally required. It also upheld the failure or refusal of the trial court to instruct the jury on the governor's power to commute a death sentence. In arriving at its decision, the Court noted: "[o]ur conclusion is not intended to override the contrary judgment of state legislatures that capital sentencing juries in their state should not be permitted to consider the governor's power to commute a sentence.[30]" In footnote 30 the Court stated that "[m]any state courts have held it improper for the jury to consider or to be informed—through argument or instruction—of the

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pravity of mind); *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271 (1983) (aggravated battery and depravity of mind); *Whitley v. Commonwealth*, 223 Va. 66, 286 S.E.2d 162 (1982) (aggravated battery); *(James) Briley v. Commonwealth*, 221 Va. 563, 273 S.E.2d 57 (1980) (aggravated battery and depravity of mind); *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979) (depravity of mind).

possibility of commutation, pardon or parole." Id. at ——, 103 S.Ct. at 3459. While not exactly on point, we think *Ramos* indicates that the Court would decide that while it is constitutionally permissible to instruct the jury on the subject of parole, such an instruction is not constitutionally required. We so hold. Accord *O'Bryan v. Estelle*, 714 F.2d 365, esp. 389 (5th Cir. 1983).

We have considered each of the issues raised by Turner in his appeal and find that he had a constitutionally fair trial.

Our stay of the state court's order to impose its sentence is hereby dissolved.

The judgment of the district court is AFFIRMED.

JAMES DICKSON PHILLIPS, Circuit Judge, specially concurring:

I concur in the judgment and in all of the opinion except that part dealing with the claim of due process denial in refusing to question prospective jurors about the possibility of racial bias. On that point I believe the majority opinion puts too restrictive a reading on the circumstances that may entitle a criminal defendant, as a matter of due process, to have prospective jurors so questioned. But because I further believe that the circumstances giving rise to the right were not demonstrated here under a proper application of the principle, I concur in the court's conclusion that no due process denial was established.

As I read *Rosales-Lopez v. United States*, 451 U.S. 182, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981); *Ristaino v. Ross*, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976); and *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973), in conjunction, they yield the following principles.

The fact alone that defendant is of a different race than the crime victim is not a circumstance giving rise

to the due process right, *Ristaino*, 424 U.S. at 596, 597, 96 S.Ct. at 1021, 1022; nor is this altered by the nature of the crime charged or the punishment possible, *see Ristaino*, 424 U.S. at 596 n. 8, 96 S.Ct. at 1021 n. 8 (generally rejecting *per se* approach based upon non-case-specific factors such as violent nature of crime). But special circumstances giving rise to the right may be present in a case in which racial issues are "inextricably bound up with the conduct of the trial." *Id.* at 597, 96 S.Ct. at 1021 (so interpreting basis of right recognized in *Ham* where racial prejudice against defendant was raised as defense on the merits). And, aside from specific trial issues, "more substantial indications [than race differences alone] of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case" may trigger the right. *Rosales-Lopez*, 451 U.S. at 190, 101 S.Ct. at 1635 (dicta: constitutional test stated in applying broader supervisory rule for federal courts); *see also Ristaino*, 424 U.S. at 598, 96 S.Ct. at 1022 (constitutional right might arise not only from specific trial issues but from "racial factors . . . of comparable significance").

But as I read the majority opinion, it reads these decisions more restrictively in holding that only "special circumstances in the facts surrounding a particular trial" invoke the constitutional right, and that "the fact that a larger percentage of white victims' assailants are executed" may not be such a special circumstance. If by this the majority is saying that only when *Ham*-type racial issues are bound up in the merits of a criminal trial can the due process right arise, I cannot agree. Obviously, if this were correct, it would follow that factors related solely to likely juror attitudes independent of specific issues in a particular case—including statistical demonstrations of jury propensities—would always be irrelevant.

But, as indicated, I do not read the authoritative Supreme Court decisions to limit the right to *Ham*-type

situations. I believe that not only specific racial issues in the particular case but a demonstrated likelihood of racial prejudice affecting the "particular" jury, irrespective of specific issues, may invoke the constitutional right. And I would not be prepared flatly to rule out as possible means, among others, of demonstrating such a likelihood scientifically sound statistical evidence related to community attitudes as reflected in jury performance in sufficient samples of comparable cases.

But to demonstrate that such a propensity was sufficiently likely to afflict the "particular" jury in a given case, I think the evidence offered—whatever its source and content—would have to be much more focussed in time and geographical terms upon the very community from which the particular jury venire is drawn than was the evidence here advanced by Turner. That evidence consisted only of the following:

> (1) A study by Bowers and Pierce of post-*Furman v. Georgia* data collected through December 1977 from Georgia, Florida, Texas, Alabama and Ohio, which revealed that 14.59% of blacks killing whites received the death penalty, compared to 2.66% of whites killing whites, 0.54% of blacks killing blacks, and 0.50% of whites killing blacks;
>
> (2) a 1983 study by Gross and Mauro of data through 1980 from Oklahoma, North Carolina, Mississippi, Virginia and Arkansas. The Virginia data focused on 19 cases out of 1389 criminal homicides, these cases being chosen to control for attitudes about the degree of atrocity involved in the homicide. The statistical analysis of Virginia data showed 8.2% of blacks killing whites receiving the death sentence compared to 1.3% of the whites killing whites and 0.60% of blacks killing blacks. No white had received the death penalty for killing a black under Virginia's 1977 capital punishment statute.

This evidence, whatever its general statistical reliability as a measure of community attitudes over the wide expanses of area and time covered, is simply too diffused in its depiction of likely community, hence juror, attitudes in this particular case to invoke the right. But I am not prepared to hold, as I think the majority opinion implies, that the requisite likelihood, hence the due process right, can never be shown by statistically sound evidence of particular community attitudes as reflected in sufficiently contemporary jury verdicts in comparable situations.

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No. 84-6646

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIE LLOYD TURNER,

Petitioner,

v.

ALLYN R. SIELAFF
Director, Virginia Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Where a capital murder case is being tried in a rural county in a state where the death penalty has historically been imposed in a racially discriminatory manner, and where the death sentence is being sought for a black man who is accused of killing a white man, must the trial court grant the defendant's request that the prospective jury members be questioned about their racial prejudices?

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ASSIGNMENT OF ERROR

The trial court's refusal to *voir dire* the jury concerning their racial prejudices denied Petitioner his right to a fair and impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3), in that Petitioner alleges violations of rights guaranteed him by the Sixth and Fourteenth Amendments to the United States Constitution.

STATUTORY PROVISIONS INVOLVED

The Virginia statute that states the substantive standards for imposition of the death sentence is *Va. Code Ann.* § 19.2-264.2 (Cum. Supp. 1977):

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

According to *Va. Code Ann.* § 19.2-264.4(B), mitigating evidence may include, but shall not be limited to, the following:

> (i) The defendant has no significant history of prior criminal activity, or

(ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, or

(iii) the victim was a participant in the defendant's conduct or consented to the act, or

(iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or

(v) the age of the defendant at the time of the commission of the capital offense.

CONSTITUTIONAL PROVISIONS INVOLVED

This case presents violations of the Sixth and Fourteenth Amendments to the United States Constitution, which are set out, in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

U.S. CONST. AMEND. VI.

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

U.S. CONST. AMEND. XIV.

STATEMENT OF THE CASE

Petitioner will refer to the Joint Appendix by the designation "J.A." The trial record will be referred to by the date of the testimony and the page number.

On July 12, 1978, W. Jack Smith was killed in the Town of Franklin, in the County of Southampton, Virginia. Petitioner Willie Lloyd Turner was arrested and charged with capital murder, robbery, and using a sawed-off shot-

gun in the commission of a robbery. Because of prejudicial pre-trial publicity in Southampton County, a change of venue was granted, and the trial was moved to Northampton County, a thinly populated rural county on Virginia's Eastern Shore. The trial began on December 3, 1979. On December 4, 1979, the jury found Petitioner guilty of all charges. On December 6, 1979, the jury fixed his punishment at death. On February 6, 1980, Judge Godwin imposed the sentence of death upon Petitioner.

Petitioner's conviction and sentence were affirmed by the Virginia Supreme Court, *Turner* v. *Commonwealth*, 221 Va. 513, 273 S.E.2d 36 (1980), *cert. denied*, 451 U.S. 1011 (1981).

Petitioner's Petition for Writ of Habeas Corpus in the Circuit Court for the County of Southampton was denied, without an evidentiary hearing, and the Virginia Supreme Court refused to appeal. This Court denied a Petition for Writ of Certiorari. *Turner* v. *Morris*, *cert. denied*, ___ U.S. ___, 77 L.Ed.2d 1341 (1983).

On July 27, 1983, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Virginia, Norfolk Division, the Honorable John A. MacKenzie, presiding. Judge MacKenzie heard argument, denied Petitioner's motion for an evidentiary hearing, and entered an order dated May 23, 1984, denying relief but granting a certificate of probable cause. Petitioner then filed a Motion to Alter or Amend the Judgment, which was denied by order dated July 19, 1984.

The Fourth Circuit Court of Appeals affirmed the District Court's judgment by order dated January 25, 1985. This Court granted Petitioner's Petition for Writ of Certiorari on May 13, 1985. *Turner* v. *Sielaff*, *cert. granted*, ___ U.S. ___, 53 U.S.L.W. 3807.

STATEMENT OF FACTS

The Offense

On July 12, 1978, Willie Lloyd Turner, a black man, walked into Smith Jewelers in Franklin, Virginia, in the County of Southampton. Brandishing a sawed-off shotgun, he demanded that the proprietor, W. Jack Smith, a white man, fill up some bags with jewelry. Smith triggered the silent alarm, and moments later Officer A. D. Bain, Jr., arrived. Officer Bain walked in, unsuspecting; Turner then disarmed him and told him to stand in the back of the store with the rest of the customers who had been in the store at the time that Turner walked in. At Turner's order Smith began to fill bags with jewelry, when Turner apparently became concerned about the possibility that other police officers would come in the back. He fired a pistol shot into the back wall of the store. Officer Bain tried to reassure Turner that no police officer was going to come in the back; Bain testified that, at that point, Turner stated that "if he saw or heard any more police officers, he was going to start killing. About that time, I heard a siren go off." Turner apparently panicked, and fired Bain's service revolver at Smith, the shot grazing Smith's scalp. Smith fell to the floor.

In the confusion, one customer and one employee were able to sneak out the front door. Bain tried to talk to Turner, but Turner merely got angry. He said "I'm going to kill that nigger for snitching on me." He then shot Smith, who was lying on the floor, twice through the chest from the back. The two shots were fired in rapid succession, one right after the other. Either of the two shots to the chest would have been fatal. As Turner turned away from Smith, Officer Bain attacked him, disarmed him and placed him under arrest.

Evidence in Aggravation

The Commonwealth presented both aggravating circumstances, as provided in *Va. Code Ann.* § 19.2-264.2, to the jury, and presented evidence in support of the "future dangerousness" circumstances by introducing copies of the judgment orders of conviction from Turner's earlier convictions. Those orders showed the following convictions:

September 21, 1970—malicious maiming;

March 22, 1972—escape;

February 12, 1973—unlawful wounding;

September 26, 1973—malicious wounding;

March 21, 1974—second degree murder.

The last four offenses occured in prison.

Evidence In Mitigation

Turner offered the testimony of Dr. Robert C. Bransfield, a psychiatrist who had been appointed to assist the defense. Dr. Bransfield testified that he first obtained a family history, which showed that Turner was an abused child, growing up in a home with an alcoholic father who beat him regularly. As a child, Turner had begun to experience auditory hallucinations and nightmares (Dec. 5, 1979, at 60).

After the first interview, Dr. Bransfield made a tentative diagnosis of latent schizophrenia with paranoid features (*Id.* at 61), and he ordered psychological testing. Dr. Bransfield had also noted that Turner showed "depressive symptoms" and "psychotic tendencies," (*Id.* at 58); he prescribed Mellaril and imipramine, and both the

depressive and the psychotic symptoms showed improvement after administration of medication. After further testing, Dr. Bransfield concluded that Turner was an antisocial personality with paranoid tendencies, and that the psychotic symptoms "tended to come out more in times of stress." (*Id.* at 62). Dr. Bransfield then testified about the stresses that were impinging on Willie Turner on July 12, 1978, noting that the paranoid and depressive symptoms had been becoming more severe in the few weeks before the murder. Dr. Bransfield then testified that Turner "was under the influence of mental disturbance while he was committing the crime." (*Id.* at 69), and that "if he would have had treatment at that time, Mr. Smith would not have been killed." *Id.* at 98.

Petitioner's mother, Gussie Turner, testified that her son had been acting very strangely in the weeks before the offense—he seemed to be in a daze (*Id.* at 118), and playing with guns (*Id.* at 119). She called the police to ask them to help her son, and to get him some treatment (*Id.* at 121), but he never received any psychiatric help. Willie's counsin, Cora Kelly, testified that Willie's father drank heavily. *Id.* at 139. Finally, Willie's aunt, Lizzie Peebles, testified that he had never shown any signs of violence toward the family until May, 1978.

Voir Dire

The trial court conducted all *voir dire*, from written questions submitted by counsel. Turner's counsel submitted a number of questions, including the following:

> (10) The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on evidence?

The Court refused to *voir dire* the venire on their racial attitudes, to which refusal counsel objected.

The entire *voir dire* occupied 58 pages (Dec. 3, 1979, pp. 42-99) of transcript, and took less than two hours. During that two-hour period, 31 different veniremen were questioned—25 to get to a jury of 12, and six more to arrive at two alternates. In addition to selecting a jury during those two hours, though, the Court conducted other business. All 43 veniremen were asked to state their names, addresses and how far they lived from the court house; three sidebar conferences were held that were not transcribed (Dec. 3, 1979, pp. 42, 46, 55); counsel argued about exclusions for cause (pp. 48-49, 55-60, 65-68, 75-79, 86, 91); and counsel apparently made their peremptory strikes.

The only *voir dire* questions that elicited answers were the questions about the veniremen's views on the death penalty and whether they or members of their family had been victims of crime.

How This Question Was Treated Below

On direct appeal, counsel for Turner made myriad objections to the *voir dire*, including that counsel should have been permitted to participate in *voir dire* (this objection was made on both statutory and constitutional grounds), that the jury should not have been "death-qualified," that Samuel Cypress should not have been excused for cause, that the jury should have been questioned about racial prejudice, and that, taken as a whole, the *voir dire* was inadequate constitutionally. The Virginia Supreme Court found that there were no defects in the *voir dire*, and affirmed on all issues. All of the issues (except the state statutory argument on counsel's participation in *voir dire*) were presented to the federal

courts, with the major *voir dire* issue being the question that is presented here—whether the veniremen should have been questioned about their racial attitudes.

The Fourth Circuit affirmed, relying on *Ristaino* v. *Ross*, 424 U.S. 589 (1976), and *Rosales-Lopez* v. *United States*, 451 U.S. 182 (1981), to reject Turner's contention.

> There must exist some special circumstance in the facts surrounding a particular case before such voir dire is constitutionally required. We are of opinion that the nature of the crime or punishment itself is not a special circumstance. Nor is the fact that the victim is white and the defendant black, as *Ristaino* specifically so held. We are also of opinion that the fact that a larger percentage of white victims' assailants are executed than are other races is not a special circumstance. "There is no constitutional presumption of juror bias for or against members of any particular racial ethnic groups."

Turner v. *Bass*, 753 F.2d 342, 345 (4th Cir. 1985) (citing *Rosales-Lopez*, 451 U.S. at 190.)

Judge Phillips concurred, noting that he would make clear that particularized data relating specifically to jury prejudice at the time and place of trial might well constitute grounds for *voir dire* on that issue.

SUMMARY OF ARGUMENT

The recent executions in Richmond, Virginia, of Linwood Briley and James Briley have brought cheering, chanting crowds to the Virginia State Penitentiary, shouting "Fry, nigger, fry," and "Burn, Briley, burn." Members of the crowd wave Confederate flags and shout "White power" and "Sieg Heil" as they give Nazi salutes. Obviously, the enactment by the Virginia General Assembly of a post-*Gregg* death penalty statute has not ended bigotry in Virginia, and has not purged bigots from jury

lists. And while the post-*Gregg* statute has apparently contributed greatly to the reduction in the racial discrimination that attended the imposition of the death sentence in Virginia in years past, even the post-*Gregg* statutes require for their fair application vigilance against the intrusion of racial prejudice.

The starting point for such vigilance must be the jury selection process, and the fundamental question presented in this case is whether a black defendant accused of killing a white has a right to *voir dire* the jury panel to be sure to exclude those who favor the death penalty as weapon of bigotry.

The decisions of this Court—*Ham* v. *South Carolina*, 409 U.S. 524 (1973), and *Ristaino* v. *Ross*, 424 U.S. 589 (1976)—have set up a case-by-case analysis to determine whether a jury panel must be asked about possible racial prejudices. That case-by-case analysis requires reversal in a case such as this in which the jury was asked both to find guilt and set sentence in a capital case[1] in which the sentencing decision is not clear-cut, particulary where the *voir dire* is a perfunctory as it was in this case. Under such circumstaces Petitioner's Sixth Amendment right to a trial by an impartial jury and his Fourteenth Amendment right to due process of law have been violated.

ARGUMENT

At trial, Petitioner requested the court to ask the prospective jurors the following question:

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[1] The Georgia Supreme Court apparently regards this as its constitutional obligation in a capital case. *See Henderson* v. *State*, 251 Ga. 398, 306 S.E.2d 645 (1983), *citing Ham*, *supra*, and *Reid* v. *State*, 129 Ga. App. 657, 200 S.E.2d 454, 455 (1973).

> The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?

The court refused to question the venire panel about racial prejudice.

I. THIS COURT HAS ADOPTED A CASE-BY-CASE ANALYSIS WHEN *VOIR DIRE* IS REQUESTED ON RACIAL ATTITUDES.

This Court has held that a defendant has a constitutional right to have veniremen examined on racial prejudice when there is some "special circumstance" about the trial that makes it likely that racial attitudes will be relevant. In *Ham* v. *South Carolina*, 409 U.S. 524 (1973), this Court reversed the conviction of a black civil rights worker in South Carolina who had been charged with possession of marijuana. His defense was that he had been framed in retaliation for his civil rights activities. He had asked that the jury be examined on racial attitudes, and that request was denied. The Court unanimously agreed that due process required that his jury panel be questioned concerning racial prejudice, but held, 7-2, that there was no reason to *voir dire* the jury concerning their feelings about people who wear beards. The Court obviously did not regard the possibility of prejudice against those wearing beards to be a matter of constitutional significance; the Court referred to the history of racial discrimination and the protection given by the Fourteenth Amendment to blacks in particular in drawing the distinction.

In *Ristaino* v. *Ross*, 424 U.S. 589 (1976), the Court held that *voir dire* on racial prejudice was not constitutionally

required, where the only factor that seemed to call for such *voir dire* was the fact that it involved a black defendant charged with armed robbery and assault upon a white security guard. The Court interpreted *Ham* as follows:

> By its terms *Ham* did not announce a requirement of universal applicability. Rather, it reflected an assessment of whether under all of the circumstances presented there was a constitutionally significant likelihood, absent questioning about racial prejudice, that the jurors would not be as 'indifferent as [they stand] unsworne.'

424 U.S. at 596. The Court noted in a footnote that

> In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion.

Id. at n. 8.

The latest decision by this Court on this issue is *Rosales-Lopez* v. *United States*, 451 U.S. 182, 192 (1981), in which the Court, exercising its supervisory powers over federal courts, held that

> [f]ederal trial courts must make such an inquiry when requested by a defendant accused of a violent crime where the defendant and the victim are members of different racial or ethnic groups.

The Court refused to find that there was a constitutional requirement for *voir dire* on racial attitudes in that case, which involved a Mexican who was helping other Mexicans to enter the United States illegally. Justice White, writing for the plurality, noted that there is not "presumption of juror bias."

> Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartiality with [racial prejudice] amount to an unconstitutional abuse of discretion.

451 U.S. at 190.

The question, therefore, is whether there are "more substantial indications" then in *Ristaino* v. *Ross* or *Rosales-Lopez* that racial prejudice would affect the jurors.

An examination of the record in *Rosales-Lopez* v. *United States*, shows no indication that the defendant there tried to establish the likelihood of racial prejudice. In the absence of any evidence, and there being no presumption of racial prejudice, there was no basis in the record for any finding that the defendant was entitled to such *voir dire*.

Here, however, we are not asking the courts to indulge in a "presumption" of prejudice; we ask only that actual evidence offered by considered. It appears from this Court's opinions in *Rosales-Lopez* and *Ristaino* that no evidentiary showing was made in support of "the presumption of juror bias." We do not ask this Court to assume anything, or to presume anything. We ask only that this Court look at the facts. We have proffered in two courts below evidence that is credible and reliable. No evidentiary hearing has yet been held on this issue. This case is therefore not governed by *Ristaino* and *Rosales-Lopez*.

II. THIS CASE INVOLVED "MORE SUBSTANTIAL INDICATIONS OF THE LIKELIHOOD OF RACIAL PREJUDICE AFFECTING THE JURORS."

Although nothing about the facts of *crime* suggests racial animus, there are a number of circumstances sur-

rounding the case *as it came to court* that are "substantial indications of the likelihood of racial prejudice affecting the jurors." *Rosales-Lopez* v. *United States*, 451 U.S. 182, 190 (1981).

— Turner is a poor black; his victim was white, and a successful small businessman.

— Virginia has a history of imposing the death sentence disproportionately against blacks and against those who kill whites. There are still many people in Virginia who apparently regard electrocution as being more often appropriate for black defendants.

— Because of inflammatory pretrial publicity, venue had been changed to Northampton County, a rural county 150 miles away, with which neither counsel nor the court were familiar.

— Counsel was not permitted to participate in *voir dire;* the judge conductd a very cursory *voir dire*, which lasted less than two hours and which elicited virtually no information about any of the jurors except their views on the death penalty.

— Virginia allows only four peremptory challenges in a capital case—the fewest of any state in the country.

— This was a capital murder case, in which the death penalty was to be imposed by the jury based on their own subjective feelings about whether Willie Turner "deserved" death.

— This was a "mid-range" case—a bungled robbery, not particularly aggravated, with psychiatric evidence that tended to establish the existence of a statutory mitigating circumstance.

— Statistical evidence indicates that the influence of racial prejudice in the decision to sentence to death is most pronounced in "mid-range" cases.

— Under Virginia practice, the jury recommendation on sentence is virtually conclusive; the trial judge cannot impose the death sentence if the jury returns with a verdict of life, and the judge's power to reduce a death sentence handed down by the jury has been infrequently used.

— The Virginia Supreme Court has never found a death sentence to have been imposed under passion or prejudice, and has never found a jury's determination of an aggravating circumstance to be unjustified or a death sentence to be disproportionate.

Given all of these circumstances, the trial court erred in refusing counsel's timely request to not question the veniremen about their possible racial prejudices.

A. The Race Of The Victim And The Defendant.

Petitioner is a black man; his victim, W. Jack Smith, was a white man. The jury became aware of Mr. Smith's race when the Commonwealth introduced, through the medical examiner, a photograph (Commonwealth's Exhibit 10) of an entrace wound in Mr. Smith's head, a photograph (Commonwealth's Exhibit 11) of the exit wound from Mr. Smith's head, and a photograph (Commonwealth's Exhibit 12) of Mr. Smith's chest, showing two entrance wounds.[2]

B. The Death Penalty Has Historically Been Applied Discriminatorily In Virginia.

1. The Death Penalty Before *Furman* v. *Georgia*.

Before *Furman* v. *Georgia*, 408 U.S. 238 (1972), the death sentence was applied in Virginia in a racially dis-

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[2] The defense objected to the photographs on the ground that they would inflame or prejudice the jury, but that objection was overruled. The Virginia Supreme Court affirmed. *Turner* v. *Commonwealth*, 221 Va. 513, 531, 273 S.E.2d 36 (1980), *cert. denied*, 451 U.S. 1011 (1981).

criminatory fashion. Before the Civil War, the Virginia Code provided for different punishment for whites, free blacks and slaves.

> Virginia law at the outbreak of the Civil War divided criminals into three classes. For whites, the law authorized capital punishment only for murder, treason, and arson. Free Negroes could receive the death penalty for these three offenses plus rape and attempted rape, if the victim were white. In addition, the state could execute slaves for burglary, armed robbery, kidnapping and any other offense which was punishable by imprisonment for more than three years if committed by a free man.

Note, "Capital Punishment In Virginia," 58 Va. L. Rev. 97, 104-105 (1972).[3]

Following the Civil War and the enactment of the Fourteenth Amendment, the Virginia General Assembly abolished the clear race-dependent differences, added burglary, armed robbery, rape and (in 1984) attempted rape to the list of capital offenses, and controlled jury selection to guarantee all white juries.

> Since the legislature apparently felt it impolitic to distinguish penalties by race, they made the death

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[3] The Virginia General Assembly in the 1800's considered the "death worthiness" of certain cases to be a function not only of the race of the offender but also of the victim. The rape statute, for example, expressly

> provided that if a slave or free Negro raped a white woman he was to be punished with death. The original penalty for the attempted rape of a white woman by a black man was castration, but later the legislature extended the death penalty to cover that crime also. In contrast, the law offered little protection to a black woman raped by a white man. The maximum penalty was only a term of imprisonment, and Negroes were incompetent by statute to testify against a white criminal defendant. Without the testimony of the victim, proving such essential elements of the crime of rape as force and penetration would obviously present certain practical difficulties.

Id. at 104.

> penalty discretionary for these crimes, and placed their trust in the judgment of white judges and white juries.

Id. at 106.

In 1908, Virginia executions were centralized in the Virginia State Penitentiary, and the Department of Corrections has kept records of those who have been executed since then. (No authoritative data exists for pre-1908 executions.) Between 1908 and 1962, 236 people were executed in Virginia; 202 were black. Forty-one blacks were executed for rape, fourteen blacks executed for attempted rape, and five blacks executed for armed robbery. No whites were executed for those three offenses. *Id.* at 142.

When all Virginia death sentences were nullified in 1972 in *Furman* v. *Georgia*, there were eight men on Virginia's death row; five were black and three were white. Six were on death row for murder, and two (both black) were on death row for rape. *Id.* at 113 n.107.

Even more striking are the statistics correlating the imposition of the death sentence with the race of the victim. Between 1908 and 1962, no one was executed for a crime against a black victim.

In sum, therefore, the disparity on the basis of race of the offender or race of the victim in the imposition of the death sentence in Virginia before *Furman* v. *Goergia* was "sufficiently large" that "it is unlikely that it is due solely to chance or accident," *Casteneda* v. *Partida*, 430 U.S. 482, 494 n.13 (1977). This statistical disparity, combined with the history of racial discrimination in Virginia's courts, fully supports a conclusion that, at least before 1972, racial prejudice was an important factor in determining who was sentenced to death in Virginia.

2. This Court's Holding In *Furman* Was Based In Large Part On Evidence Of Racially Discriminatory Application.

When this Court struck down capital sentencing procedures in *Furman* v. *Georgia*, 408 U.S. 238 (1972), five justices, representing seven votes, addressed race discrimination in their individual opinions. *See* 408 U.S. at 249-52 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 364-66 (Marshall, J., concurring); *id.* at 389-90 n.12 (Burger, C. J., dissenting); *id.* at 449 (Powell, J., dissenting).

The thrust of the argument to this Court in 1972 was that the death penalty was being imposed on the basis of race, as shown by many statistical studies. *See, e.g.*, H. Bedau, *The Death Penalty in America* (1967 rev. ed.); Hartung, "Trends in the Use of Capital Punishment," 284 Annals Am. Acad. of Pol. & Soc. Sci. (1952); R. Clark, *Crime in America* 335 (1970); Wolfgang, Kelly & Nolde, "Comparison of the Executed and the Commuted Among Admissions to Death Row," 53 J. Crim. L. Criminology & Police Sci. 301 (1962). Justice Marshall summarized the statistics as follows:

> It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination.

408 U.S. at 364. *See also* W. Bowers, Executions in America (1974).

Even the dissenters in *Furman* apparently conceded that the death sentence had historically been imposed pursuant to a racially discriminatory pattern. Justice Powell, writing for himself, Chief Justice Burger, Justice

Blackmun, and Justice Rehnquist, called the "discriminatory application of the death penalty in the past admittedly indefensible." 408 U.S. at 450.

3. The Reliance On Prophylactic Procedural Changes.

The many opinions in *Furman* v. *Georgia* broke down essentially into those who felt that the arbitrary and capricious imposition of the death penalty required major change, and those who felt that the natural evolution of criminal law was making irrelevant the statistics of past discrimination. Justice Powell's dissent, in which he wrote for himself, Chief Justice Burger, Justice Blackmun, and Justice Rehnquist, commented that

> [t]he possibility of racial bias in the trial and sentencing process has diminished in recent years. The segregation of our society in decades past, which contributed substantially to the severity of punishment for inter-racial crimes, is now no longer prevalent in this country. Likewise, the days past when juries do not represent the minority group elements of the community. The assurance of fair trials for all citizens is greater today than at any previous time in our history. Because standards of criminal justice have "evolved" in a manner favorable to the accused, discriminatory imposition of capital punishment is far less likely today than in the past.

408 U.S. at 450. Four members of the court were saying, in essence, that procedural guarantees, representation of blacks on juries, and generally heightened sensitivity to the possibility of racial prejudice may be relied upon to prevent racial prejudice from infecting the entire system of the administration of justice to the extent that it had in years past. The dissenters in *Furman* rejected the claims of systematic discrimination, and they (and now the majority of this Court) have instead placed the emphasis on the more mundane issues—on Fifth and Sixth Amend-

ment claims, for example, rather than on Eighth Amendment claims.

This Court has consistently recognized that the "qualitatively different" nature of the punishment in capital cases leads to a "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.' *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976)," *Caldwell* v. *Mississippi*, 53 U.S.L.W. at 4744, requiring "a correspondingly greater degree of scrutiny of the capital sentencing determination," *California* v. *Ramos*, 77 L.Ed.2d at 1179.

Capital cases often present familiar Fifth and Sixth Amendment issues in different factual and legal contexts, and the Court has not hesitated to apply these old doctrines to new fact situations in capital cases where necessary to protect those rights. *See Ake* v. *Oklahoma*, 470 U.S. ___, 84 L.Ed.2d 53 (1985); *Estelle* v. *Smith*, 451 U.S. 454 (1981); *Bullington* v. *Missouri*, 451 U.S. 430 (1981). In *Ake* and *Estelle* v. *Smith*, the Court recognized that if the sentencing process is unfair or permits the injection of unreliable or arbitrary factors, there can be no confidence in the result of that process.

Nothing in Justice Powell's dissent in *Furman*, or elsewhere in this Court's Eighth Amendment jurisprudence, supports the suggestion that a post-*Furman* death penalty statute guarantees that the result in a particular case will always be fair and unbiased. *Furman* addressed itself only to systemic discrimination, not bias in a particular case.

Justice Powell was obviously correct in stating that the level of segregation has declined in recent years, as blacks and whites have broken down the barriers of segregation. This Court's rulings in the area of school desegregation

have, themselves, probably done more than anything else to bring about a change in the attitudes of prospective jurors.

However, the decisions of this Court do not magically change the hearts and minds of the populace. *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), forbade excluding blacks from juries, but the inventiveness of local officials in constructing Jim Crow laws continued to keep blacks off juries in most jurisdictions in the South. *Strauder* laid down the law, but that law was not followed until the massive societal and political changes of the 1960's.[4]

Similarly, racial prejudice was not abolished in our society by this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and racial prejudice was not eliminated from the minds of those who are called to serve on our juries by this Court's decision in *Furman*.

4. The Death Penalty After *Furman* and *Gregg*.

After *Furman*, the Virginia General Assembly adopted a mandatory death penalty statute of the type struck down in *Woodson* v. *North Carolina*, 428 U.S. 280 (1976). Also in 1976, of course, this Court approved new statutes that guided the discretion of the jury so as to eliminate the arbitrary and capricious manner in which death was being imposed. *Gregg* v. *Georgia*, 428 U.S. 153 (1976). After the Court's 1976 decisions, the General Assembly adopted the current statutory scheme.

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[4] Virginia officials used literacy tests and imposed a poll tax to exclude blacks from the voting lists (a practice ruled unconstitutional in *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966)), then used the voting lists as the pool from which the usually all-white jury commissioners would hand-pick prospective jurors.

Statistical evidence shows that the racially discriminatory impact noted before *Furman* is less pronounced now, but that discriminatory impact has not disappeared. Statistical studies have correlated death sentences with the race of the victim and the race of the offender. The evidence has shown that blacks are more likely to receive the death penalty than whites, and those who kill whites are more likely to receive the death penalty than blacks.[5] The only study of Virginia patterns that is in evidence is the study by Gross and Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing in Homicide Victimization* 15-32 (unpublished study) (October, 1983). As is set forth in greater detail *infra*, Professors Gross and Mauro found that since 1977, a black who kills a white is six times more likely to be sentenced to death than a white who kills a white. No such comparison is available for black victims, because no white has ever been sentenced to death for the murder of a black.

Statistics, of course, have often been used as circumstantial evidence of discriminatory intent; statistics may in some cases be "so strong that the only permissible inference is one of intentional discrimination." *Adams* v. *Wainwright*, 709 F.2d 1443, 1449 (11th Cir. 1983), *cert. denied*, ___ U.S. ___, 79 L.Ed.2d 203 (1984); *McCleskey*

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[5] Petitioner was proffered two studies tending to show that the death penalty is being imposed discriminatorily upon blacks, and in particular on blacks who kill whites. At trial, Petitioner introduced a study by Bowers and Pierce (Defendant's Exhibit 1); after having been denied an evidentiary hearing on this issue, Petitioner proffered as an exhibit to his Motion to Alter or Amend Judgment the study by Gross and Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing in Homicide Victimization* 15-32 (unpublished study) (October, 1983).

v. *Kemp*, 753 F.2d 877, 892 (11th Cir. 1985) (en banc); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1880).

The courts have rejected the oft-asserted claim that the death penalty is being imposed discriminatorily. *McCleskey* v. *Kemp*, 753 F.2d 877 (11th Cir. 1985) (en banc); *Shaw* v. *Martin*, 733 F.2d 304 (4th Cir. 1984); *Sullivan* v. *Wainwright*, 721 F.2d 316 (11th Cir. 1983); *petition for stay of execution denied*, ___ U.S. ___, 78 L.Ed.2d 210 (1983); *Adams* v. *Wainwright*, 709 F.2d 1443 (11th Cir. 1983), *cert. denied*, ___ U.S. ___, 79 L.Ed.2d 203 (1984); *Spinkellink* v. *Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

Some of these decisions have been based on concerns about the methodology of the studies, *see McCleskey, supra*, at 896; *Sullivan, supra*, at 213; other opinions have simply concluded that the statistical evidence was not "so strong that the only permissible inference is one of intentional discrimination." *Adams, supra*, at 1449.

However, that body of case law is directed to an altogether different kind of claim from that asserted by Petitioner. We do not bring this evidence to this Court in this Brief in support of the *Spinkellink/McCleskey/Sullivan* claim that the entire statutory scheme must be invalidated on account of discriminatory impact; the evidence is offered to show that there continues to be a statistical indication that racial bias may affect the sentencing decision, and that that indication is strong enough that a state trial court should take reasonable steps to determine whether there are any people on the jury who feel that the death penalty is more often appropriate for blacks who kill whites.

C. The *Voir Dire* In This Case Was Inadequate To Search Out Prejudices, Racial Or Otherwise.

1. Since There Had Been A Change Of Venue To A Distant Rural County, Neither Counsel Nor The Judge Was Familiar With The Community From Which The Veniremen Came.

Southampton County is a county of 18,731 people. (All population figures are from Bureau of Census, *1980 Census of Population*, Vol. 1, Chapter B, Part 48 (Virginia) (1982).) While it is largely rural, it is just southwest of the Norfolk/Portsmouth metropolitan area, where almost 700,000 people live (including the cities north of the James River, the Tidewater Virginia metropolitan area exceeds 1.3 million people). The largest town is Franklin, with 7,308 people.

Northampton County is a county of 14,625 people. It is completely rural; the largest town, Cape Charles, has 1,512 people. It is on the Eastern Shore of Virginia, separated from the rest of the state by the Chesapeake Bay.

While Northampton County is just as close as Southampton County is to the Norfolk/Portsmouth metropolitan area, it is a totally different kind of community sociologically. Southampton County has many residents who commute to jobs in the cities; very few do so in Northampton County, since the one-way fare on the Chesapeake Bay Bridge-Tunnel is approximately $20.00. It is probably fair to say that the Eastern Shore has, for most of Virginia's existence, been a tranquil backwater, whereas Southampton County is a bit closer to the mainstream of Virginia life and politics.

The similarities between the two counties are such that a change of venue from Southampton County to Northampton County was not unreasonable, and Petitioner has

never quarreled with the choice of Northampton County as the site for his trial. But the differences between the two counties should have put the trial judge on notice that he might not understand the sociology of the community from which the jury pool was drawn in the same way that he no doubt understands the sociology of Southampton County, where he practiced law and had presided at trial.

In Virginia, judges sit in particular circuits, and do not sit in other circuits except by designation by the Chief Justice of the Virginia Supreme Court in a particular case. The circuit from which Judge Godwin comes, where he practiced law before coming to the bench, and where he sits regularly, is entirely in the cities and counties southwest of Norfolk and Portsmouth. The judge who sits on the Eastern Shore, on the other hand, tends to sit in those two counties most of the time, and sits in the City of Virginia Beach the rest of the time. The two circuits do not overlap, and there is no reason to believe that Judge Godwin, who presided in this case, had any familiarity with the community in Northampton County.

This Court has reposed its confidence in trial judges on matters of *voir dire*, in part because the trial judge can evaluate the venireman's responses and demeanor personally. While this Court has never said so explicitly, it is probably also fair to surmise that that confidence is also a function of the trial judge's superior knowledge of the community from which the jury is drawn. Trial judges in their home counties come to know the citizenry, and their acquaintance with the citizens informs their decisions on *voir dire*. Their familiarity with local customs and media practices informs their decisions to sequester the jury. In short, this Court's reliance on the trial judges is based in part on respect for their local knowledge.

Here, the local knowledge did not exist, and the judge did not take any action to fill that void with meaningful *voir dire*. The deference thus accorded to the trial judge's decisions on *voir dire* is correspondingly reduced.

2. The *Voir Dire* Took Less Than Two Hours, And Touched Only On Whether The Jurors Could Impose The Death Penalty And Whether They Had Ever Been Victims Of Crime.

In *Ristaino* v. *Ross*, this Court upheld the robbery conviction of James Ross, finding that the *voir dire* that had in fact been conducted was a "more generalized but thorough inquiry into the impartiality of the veniremen." 424 U.S. at 598. The Court noted that 18 veniremen were excused "for cause on grounds of prejudice, including one panelist who admitted a racial bias." *Id.* at 593. *Voir dire* apparently covered at least 117 pages of transcript (pp. 430-547 of the transcript). Even though *voir dire* was not conducted on the issue of racial prejudice, the trial judge did question the jury on the related issue of prejudice because the victim was a security guard. At least one of the defense's concerns about prejudice relating to the identity of the offender and the victim was addressed.

Similarly, in *Rosales-Lopez*, the trial judge did not ask exactly the question posed by the defense about prejudice based on race, but he did ask whether the veniremen had any prejudice against aliens. 451 U.S. at 186. Since the defendant was obviously Mexican, was charged with illegally transporting aliens into the country, and was being tried in the Southern District of California where the problem of illegal aliens is rarely far from the consciousness of most of the citizenry, it is fair to say that the jurors had their attention drawn to the potential for prejudice against Mexicans.

> There can be no doubt that the jurors would have understood a question about aliens to at least include Mexican aliens. The trial court excused two jurors for cause, based on their responses to this question. Removing these jurors eliminated, we believe, any reasonable possibility that the remaining jurors would be influenced by an undisclosed racial prejudice toward Mexicans that would have been disclosed by further questioning.

451 U.S. at 193 (White, J., for the plurality). Justice White also recognized that the fact that the general question about whether the jurors knew of any reason why they could not be fair and impartial followed the other *voir dire* about alienage made it unlikely that a juror would have responded differently to a direct question related specifically to race.

The *voir dire* in this case was not a "thorough inquiry" into possible prejudice. The *voir dire* occupied only 58 pages of transcript, 19 pages of which were taken up with legal argument. Virtually all of the *voir dire* was on *Witherspoon* issues; there was also some discussion with some jurors who had been victims of crime. No other issues of prejudice were discussed.

This Court has found no need for asking a particular question on possible racial prejudice in two cases in which the *voir dire* was otherwise thorough and focused on particular related areas of possible prejudice. The general inadequacy of the *voir dire* in this case sets this case apart from either *Ristaino* v. *Ross* or *Rosales-Lopez* v. *United States*.

3. Virginia Allows The Defense Only Four Peremptory Challenges In A Capital Case, The Lowest Number Of Any State In The Country.

In Virginia, juries in felony cases are twelve-member juries, selected from a panel of twenty; each side strikes

four members. *Va. Code Ann.* § 19.2-262 (1975 Repl. Vol.). There is no higher number in capital cases.

The American Bar Association recently recommended the process of striking a jury, and recommended that each side be permitted 10 strikes in a capital case. ABA Standards Relating to Juror Use and Management, Standard 9(d)(i) (1983). The range in capital cases across the country, according to the ABA study, was from 4 to 26 for the defendant. *See also* J. Van Dyke, *Jury Selection Procedures, Our Uncertain Commitment to Representative Panels* 282-285 (1977).

In *Swain* v. *Alabama*, 380 U.S. 202 (1965), the defendant was permitted 21 peremptory strikes, and the Court noted that defendants in trials for felonies were permitted at common law 35 strikes. *Id.* at 212. This was codified by Congress, though the number was reduced to 20 in a federal capital case in 1865. *Id.* at 214.

This Court noted that American *voir dire*

> tends to be extensive and probing, operating as a predicate for the exercise of peremptories, and the process of selecting a jury protracted. The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury.
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> * * * *
>
> The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.

Id. at 219.

Petitioner is not arguing that he was denied a fair trial because Virginia allows him only 4 peremptory chal-

lenges. But the fact that Virginia is so restrictive has two implications. First, any change to require *voir dire* on racial prejudice will not take long, because the number of jurors who would be asked the additional question or questions would likely be few indeed. Second, the fact that defendants in Virginia have little other opportunity to "eliminate extremes of partiality" is but another circumstance tending to indicate that extensive *voir dire* is necessary. When peremptory strikes are so few, they are precious and cannot be wasted on hunches and surmise unsupported by anything other than a look at the smile on the juror's face.

D. Virginia Vests Broad Discretion In Juries That Decide Whether To Sentence The Defendant To Death.

1. This Court Has Authorized Giving The Sentencer Broad Discretion In Capital Cases.

This Court has enunciated two basic principles that govern jury deliberations in capital cases.

First, the capital sentencing statute must in some way legitimately narrow the class of cases to which the death penalty may be applied, providing the sentencer some valid penological reason to impose the death sentence in one case but not in another. *Godfrey* v. *Georgia*, 446 U.S. 420, 428-429 (1980); *Zant* v. *Stephens*, ___ U.S. ___, 77 L.Ed.2d 235, 250-251 (1983). Not only must the aggravating circumstances (to use the Virginia statute's construction) actually provide a rational basis for deciding who dies, but the aggravating circumstances cannot implicate other protected rights. A state cannot attach

> the "aggravating" label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant.

Zant v. *Stephens*, *supra*, at 255.

Second, the defendant is entitled to an "individualized determination" of the appropriateness of the death sentence in his particular case. *Lockett* v. *Ohio*, 438 U.S. 586 (1978); *California* v. *Ramos*, ___ U.S. ___, 77 L.Ed.2d 1171, 1180 (1983).

Once a threshold level of aggravation has been crossed, the Constitution does not require that any particular substantive criteria be applied by the sentencer in arriving at the decision whether to impose death. *Gregg* v. *Georgia*, 428 U.S. 153, 203-204 (1976):

> We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument . . .

See also California v. *Ramos*, ___ U.S. ___, 77 L.Ed.2d 1171, 1180 (1983). In *Zant* v. *Stephens*, 77 L.Ed.2d at 248, this Court approved

> a scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute.

Most recently, this Court reversed a death sentence because of prosecutorial misconduct in final argument, noting the difficulty of the decision with which the jury was faced.

> A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument of the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to

> how their judgment should be exercised, leaving them with substantial discretion.

Caldwell v. *Mississippi*, ___ U.S. ___, 53 U.S.L.W. 4743, 4746 (June 11, 1985).

This Court has relied upon thorough and discerning appellate review to guard againt arbitrary and capricious imposition of the death penalty, *Zant* v. *Stephens*, 77 L.Ed.2d at 248, but there is nonetheless a recognition that the jury's role in a capital sentencing proceeding is "essentially unreviewable and not always rational." *Spaziano* v. *Florida*, ___ U.S. ___, 82 L.Ed.2d 340, 349 (1984). Cf. *Arizona* v. *Rumsey*, ___ U.S. ___, 81 L.Ed.2d 164 (1984). And no amount of appellate review will change the fact that the decision to impose death is often a

> highly subjective, "unique, individualized judgment regarding the punishment that a particular person deserves." *Zant* v. *Stephens*, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring in the judgment). It is beyond question that an appellate court, performing its task with a presumption of correctness, would be relatively incapable of evaluating the "literally countless factors that [a capital sentencer] consider[s,]" *id.*, at 901, in making what is largely a moral judgment of the defendant's desert.

Caldwell, *supra*, at 4748 n.7.

A "largely moral judgment of the defendant's desert" will always defy objectification.

> We have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors. But to attempt to separate the sentencer's decision from his experiences would inevitably do precisely that. It is entirely fitting for the moral, factual, and legal judg-

> ment of judges and juries to play a meaningful role in sentencing. We expect that sentencers will exercise their discretion in their own way and to the best of their ability. As long as that discretion is guided in a constitutionally adequate way, and as long as the decision is not so wholly arbitrary as to offend the Constitution, the Eighth Amendment cannot and should not demand more.

Barclay v. *Florida*, ___ U.S. ___, 77 L.Ed.2d 1134, 1144 (1983).

2. Under Virginia Law And Practice, A Jury's Recommendation Of Sentence Is Virtually Conclusive.

Under Virginia law, the jury makes only a recommendation to the judge; if that recommendation is for life imprisonment, the judge simply enters judgment, because he or she has no power to raise the punishment to death. If the jury returns with a recommendation of death, the judge has the power to sentence the defendant to life imprisonment. This power, given by *Va. Code Ann.* § 19.2-264.5 (Cum. Supp.), has virtually never been used. Virginia juries have returned the death sentence 39 times since the new statutes went into effect on July 1, 1977. In only two of those 39 cases has the judge refused to impose a jury-recommended death sentence.[6]

Though the Virginia Supreme Court is required by statute to review all death sentences to protect against arbitrary or capricious infliction of the death sentence, the Virginia Supreme Court has never found a death

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[6] Both cases involved white defendants—Keith Rohauer, in the Circuit Court for the County of Goochland (2/2/80), and Robert McClark, in the Circuit Court for the City of Danville (5/9/85). There are currently 28 men on Virginia's death row; four have died while on death row (three by execution). Of those 32 men, 18 are black, one is Asian, one was Mexican and 12 are white.

sentence to be imposed pursuant to passion or prejudice or to be disproportionate. The Virginia Supreme Court has never found any defect in the sentencing phase of a capital trial. The Court has reversed four death sentences—three for *voir dire* errors, *Justus* v. *Commonwealth*, 220 Va. 971, 266 S.E.2d 87 (1980), death sentence affirmed on appeal after retrial, 222 Va. 667, 283 S.E.2d 905 (1981); *Martin* v. *Commonwealth*, 221 Va. 436, 271 S.E.2d 123 (1981); and *Patterson* v. *Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981); and one because there was no evidence that the defendant was the triggerman, as is required as an element of capital murder under Virginia law, *Johnson* v. *Commonwealth*, 220 Va. 146, 255 S.E.2d 525 (1979). The meaningful appellate review so prized by this Court as a guarantee againt arbitrariness and capriciousness simply has not been forthcoming from the Virginia Supreme Court.

Neither the trial court nor the Virginia Supreme Court is likely to disturb a jury determination of sentence.

E. The Process By Which A Jury Decides Whether To Impose A Death Sentence Creates A Significant Likelihood That Racial Biases Will Be Affect The Jury's Decision, Particularly In A Mid-Range Case Such As This.

This Court has noted, *see Gregg* v. *Georgia*, 428 U.S. 153 (1976), that a sentencing jury must weigh retribution, deterrence, and other matters of social policy. *See also Spaziano* v. *Florida*, *supra*, 82 L.Ed.2d at 353. These are proper concerns for a sentencing jury, and are irrelevant to any other decision that any other jury would be called upon to make.

In a capital case, in which the jury imposes the sentence, the decision to impose the death sentence is intended to be, and in fact becomes, an effort to express

the "community's voice," *id.* at 354, of retribution. A majority of the justices of this Court have agreed that retribution is a valid penological purpose served by the death penalty. *See Furman* v. *Georgia*, 408 U.S. at 453 (Powell, J., dissenting) (joined by Burger, C. J., Blackmun, Rehnquist, JJ.); *Gregg* v. *Georgia*, 428 U.S. 153, 183 (1976) (Stewart, Powell, Stevens, JJ., concurring).

Virginia's "vileness" criterion is expressly intended to address the question of retribution. Whether the defendant's conduct was "outrageously or wantonly vile, horrible or inhuman" focuses the jury's deliberations on the degree of horror and revulsion which they feel about the crime and the defendant.

1. Particularly In The South, A Communal Desire For Retribution Has All Too Often Produced Lynch Mobs.

Blacks accused of crimes against whites have known all too often the power of racially motivated retribution. Within the legal system, this retribution has led to a wide disparity in sentencing, as jurors valued white lives more than black lives.[7] Outside the courts, blacks have often

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[7] The bare statistics cited elsewhere in this Brief are disturbing as indicators of prejudice, but they to a certain extent obscure the rabid feelings held by some. Perhaps the classic statement of how racial prejudice affects the criminal justice system is provided by Raymond Fosdick, a student of southern police methods in the early 1900's. One Southern policeman told Fosdick that "if a nigger kills a white man, that's murder. If a white man kills a nigger, that's justifiable homicide. If a nigger kills a nigger, that's one less nigger." C. Silberman, *Criminal Violence, Criminal Justice* 124 (1978).

been lynched upon a mere accusation of murder, rape, or other crime against white victims.[8]

The analogy to lynching is not mere rhetorical excess; Justice Stewart suggested, in essence, that the death penalty, imposed by government, was a substitute for lynching:

> In part, capital punishment is an expression of society's moral outrage in particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.
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> "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people believe that organized society is unwilling or unable to impose upon criminal defenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law."

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[8] Of 4,733 lynchings recorded in the United States between 1882 and 1968, 72.7% of the lynchings were of blacks. In Virginia, 83 of 100 lynching victims were black. R. Zangrando, *The NAACP Crusade Against Lynching, 1909-1950* 5 (1980). As Zangrando notes, the statistics do not include "legal lynchings" in which the trial was a sham and a mere prelude to the foregone conclusion of execution. *See Powell* v. *Alabama*, 287 U.S. 45 (1932).

Gregg, *supra*, at 183, quoting *Furman* v. *Georgia*, *supra*, at 308 (Stewart, J., concurring). The Virginia Supreme Court justified the death penalty for attempted rape[9] by using the same analysis:

> The likelihood of the resort to lynch law, unless there is a prompt conviction and a severe penalty imposed, and thus a resultant grave shock to the peace and dignity of the Commonwealth, is well known to exist, almost, if not quite equally, in the case of an attempted as of a consummated rape.

Hart v. *Commonwealth*, 131 Va. 726, 747, 109 S.E. 582 (1921).

In the normal criminal trial in most states, the judge sets the sentence, and the jury has no cause to address itself specifically to the issue of retribution. In *Ristaino* v. *Ross*, the jury was only making a finding of guilt; they were not imposing sentence. They were asked to apply the law to the facts; their job did not call for expressing retribution or declaring social or penological policy.

2. Although The Last Lynching Was More Than Twenty Years Ago, Racial Prejudices Still Affect The Decision To Impose The Death Penalty.

Racial tensions have eased, and our society has become much more open and accepting of those with different backgrounds. The last true lynching in the South was in 1964. But the problems of bigotry have not vanished by this Court's decree.

There is no escaping some basic aspects of human nature. Different jurors perceive blacks and whites differently. In their classic study, Kalven & Zeisel noted that

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[9] It will be remembered that only blacks have been executed in Virginia for attempted rape.

jurors tend to be less sympathetic to black defendants than to white defendants; less sympathetic jurors are more likly to convict, and are more likely to impose the death sentence. H. Kalven and H. Zeisel, *The American Jury* 210 (1966). Jury sentencing trials necessarily involve asking the jurors to act as the conscience of the community in imposing punishment. They are not merely applying facts to issues of law in determining guilt; they are also, to a certain extent, defining the law of punishment. When a jury is faced with a range of punishment from one day to five years in jail (as with a Class 6 felony in Virginia), there are no strict legal standards governing their decisions. Whether the jury recommends one day in jail or five years in jail is a function of purely subjective factors of whether the jurors like, respect, trust, excuse, empathize with, or take pity on a defendant. They are shaping very rough subjective standards into a collective community standard—the conscience of the community. If that conscience reflects racial prejudice,[10] there is an unacceptably greater chance that the black defendant will be more harshly treated.

Had there been any doubt that racial prejudice continues to affect people's perceptions of the validity of the death penalty in a given case, those doubts should have been dispelled by recent events in Virginia. On October 12, 1984, Linwood Briley was executed in Richmond, Virginia, as hundreds of whites stood outside the Virginia State Penitentiary waving Confederate flags and nooses, chanting "Burn, Briley, burn," and "Fry, nigger, fry." The Richmond News Leader reported:

> But race was an issue for some who came out last night. Two women carried signs that said "Kill the

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[10] Of course, racial prejudice is no more permissible in a juror merely because it is an attitude widely held in the community.

> Negro." A white youth spiced his screams of "Fry 'em" with racial epithets and obscentities.

"Prison Vigil: Street Divides Advocates, Opponents of Death Penalty," Richmond News Leader, October 13, 1984, at 1, col. 1. The Washington Post reported:

> Ron Doggett, 23, a landscaper, waved a Confederate flag over his head. "We want to return to the days in Richmond when this flag flew proudly," he said.

"Sorrowful, Satisfied Crowds Greet Briley Execution in Va.", Washington Post, October 14, 1984, at A1, col. 3, A12, col. 3. At the execution of James Briley on April 18, 1985, the same crowd gathered, wearing Nazi armbands and shouting "White power" and "Sieg Heil."

We do not suggest that these people are representative or typical of all Virginians,[11] and the leadership of Virginia, from the Governor to the editorial writers of the Richmond Times-Dispatch (*see* Richmond Times-Dispatch, April 20, 1985) have condemned such displays. But the recognition that responsible, right-thinking Virginians deplore such actions and such attitudes virtually compels the acknowledgement that the state has no legitimate interest in having such people on its juries.

If bigots wore signs, *voire dire* on racial prejudice would be unnecessary. Arguably, if counsel or the court was familiar with the community from which the jury poll was to be drawn, such local knowledge might render *voir dire* on racial prejudice unnecessary. But bigots don't wear signs, and the out-of-town judge had no local knowledge. This returns us to our central question—did Willie Turner have a right to know if there were any of those people on his jury?

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[11] Rabidly racist demonstrations when executions occur are not unique to Virginia; similar demonstrations have been held in Florida and Texas.

3. Although A Decision To Convict A Defendant Is Usually An Objective Decision, The Decision To Impose Sentence Is Virtually Always A Subjective Decision.

In *California* v. *Ramos*, *supra*, 77 L.Ed.2d at 1185, this Court discussed the difference in the task of the guilt/innocence jury and the sentencing jury.

> More to the point, however, is the fundamental difference between the nature of the guilt/innocence determination at issue in *Beck* [v. *Alabama*, 447 U.S. 625 (1980)] and the nature of the life/death choice at the penalty phase. . . . In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar "central issue" from which the jury's attention may be diverted. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment.

In this passage, Justice O'Connor cited in a footnote Justice Rehnquist's opinion in *Zant* v. *Stephens:*

> [S]entencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does.

77 L.Ed.2d at 266 (Rehnquist, J., concurring in the judgment).

4. The Effects Of Racial Prejudice Are Greatest When The Case Is A "Mid-Range" level of aggravation.

The various statistical studies performed on the imposition of the death sentence confirm what should seem obvious—that the effect of racial prejudice (or any other

kind of prejudice) will be most pronounced in the difficult cases—the cases in which there is some degree of aggravating evidence, but the facts are not awful; the cases in which there is some mitigating evidence, but not enough to be compelling.

Those statistics were presented at some length in the District Court hearing in *McCleskey* v. *Kemp*, 753 F.2d 877 (11th Cir. 1985) (en banc), decided January 29, 1985. In *McCleskey*, the death-sentenced inmates offered extensive statistical evidence to establish the disparate impact of the death sentence, in the hope that the federal courts would rule Georgia's death penalty statutes unconstitutional. The scientists studying the administration of the Georgia death penalty statute concluded that the mid-level cases were the ones in which the influence of racial prejudice was greatest.

> [T]he results showed a 6% racial effect systemwide for white victim, black defendant cases with an increase to 20% in the mid-range of cases.

McCleskey, supra, at 887.

F. In Virginia And Across The Country, The Death Penalty Is Still Being Applied Disproportionately Against Blacks Who Kill Whites.

The revision of death sentence statutes after *Furman* did not abolish racial prejudice, and while post-*Furman* practice has probably reduced race discrimination in the imposition of the death sentence, it has not ended it. The evidence is clear that the death penalty is still being applied in a manner that results in a disparate impact against black defendants, and particularly against those who kill whites. Bowers & Pierce, "Arbitrariness and Discrimination under Post-Furman Capital Statutes," 26 Crime and Delinquency 563 (1980); *See, e.g.*, Bowers,

"The Pervasiveness of Arbitrariness and Discrimination under Post-*Furman* Capital Statutes," 74 J. Crim. L. & Criminology 1067 (1983); Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing in Homicide Victimization* 15-32 (unpublished study) (October, 1983) (introduced as an exhibit to Motion to Alter or Amend Judgment).

At trial, Petitioner introduced a study by Bowers and Pierce (Defendant's Exhibit 1), showing the discriminatory manner in which the death sentence was being imposed in Georgia, Florida, Texas, Alabama and Ohio. In those five states, the probability of receiving the death sentence for homicide between the effective date of the various states' post-*Furman* statutes through December, 1977, was correlated with the race of the victim and of the offender. The study concluded that for all murders committed in the commission of another felony (as is usually the case in Virginia), one who kills a white is almost five times more likely to receive the death sentence than one who kills a black (17.15% as opposed to 3.87%).[12]

This data reveals a very strong likelihood that the race of the offender and the race of the victim (and, in particular, the combination of those two variables) will have a significant effect upon whether a particular defendant

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[12]

	Estimated Number of Offenders	Persons Sentenced to Death	Probability of a Death Sentence
Black kills White	443	100	22.57%
White kills White	857	123	14.35%
Total—White Victim	1,300	233	17.15%
Black kills Black	441	17	3.85%
White kills Black	50	2	4.00%
Total—Black Victim	491	19	3.87%
Total—All Victims	1,791	242	13.47%

receives the death sentence. This is true across the country, as the survey data from Georgia, Florida, Texas, Alabama and Ohio shows.

Bowers & Pierce did not study Virginia death sentences. However, Gross & Mauro did study the Virginia death sentences in nineteen cases, as compared to 1,389 homicides. The results, in rough statistical terms, show that one who kills a white is four times more likely to receive the death sentence than one who kills a black (2.3% to 0.5%). If a black kills a white, he has an 8.2% chance of receiving the death penalty; if a white kills a white, he has a 1.3% chance of receiving the death penalty; if a black kills a black, he has a 0.6% chance of receiving a death penalty; and no white has received the death penalty for killing a black since Virginia's new statute was enacted in 1977.[13]

Because the death penalty had been imposed in only 19 cases during the time period under study, Gross and Mauro could not call their Virginia data statistically significant. However, Gross and Mauro found that Virginia's data was consistent with the data from other states—an observation which is also consistent with the observation that Virginians (despite their occasional protestations to the contrary) are basically the same kind of people, with the same kinds of prejudices, as other Americans. The fact that the data for Virginia is not statistically significant because of the small sample size is therefore not relevant—our claim is dependent upon human nature, not a particular statute. The sample size for all of Gross and Mauro's studies, as for all of Bowers and Pierce's studies, is more than adequate to show the disparate impact.

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[13] James Briley's execution on April 18, 1985, marks the first time in Virginia that anyone had been executed for murder of a black.

This argument is not statute-specific or state-specific. Nothing about the Virignia death penalty statute, as opposed to the statutes of North Carolina, South Carolina or any other state, makes it less likely that racial prejudice will motivate a juror to return a verdict of death.[14] Nor can it seriously be suggested that the ethos of the citizenry of Virginia is significantly different of that of any other southern state.[15]

All of the data, taken together, show clearly that those who kill whites are far more likely to receive the death penalty than those who kill blacks.

Of course, since we are not asserting a *Furman*-like rationale, we need not show that Willie Turner's death sentence can only be explained by racial prejudice on the jury, or that statistical evidence is "so strong that the only permissible inference is one of statistical discrimination." *Adams* v. *Wainwright*, *supra*, 707 F.2d at 1449. We need only show that there was a "more substantial indication of the likelihood of racial prejudice affecting the jurors' deliberations" in this case. *Rosales-Lopez*, *supra*, at 190.

The statistics just mentioned are admittedly not conclusive in Virginia to justify the drastic step of declaring the Virginia system to be unconstitutional. However, the data clearly indicate a tendency that courts must take

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[14] Indeed, if anything, the basically subjective, discretionary nature of the vileness and dangerousness criteria make it more likely that Virginia juries will lack objective, reviewable criteria for imposing death.

[15] Or that of most other states across the country. Racism has long been a particular problem in the South, but is by no means unique to the South. The data offered at trial from Professors Bowers and Pierce shows that racially discriminatory application was suggested in Ohio as well as in four southern states.

active measures to counter. Courts must be vigilant to potential racial influences in a trial, and these influences must be eliminated wherever possible.

CONCLUSION

This Court's decision in *Gregg* v. *Georgia*, 428 U.S. 153 (1976), together with the other cases decided that day, may be interpreted as saying, in essence, that the death penalty is permissible *because*, and only because, the newly redrafted statutes effectively channel the discretion of the jury. This Court assumed in *Gregg* that the state trial and appellate courts would exercise stricter review of the jury-imposed death sentences; that review would be more searching than usual, and would be particularly attuned to suggestions of arbitrariness or prejudice.

The extra solicitude shown in capital cases was highlighted in *Gardner* v. *Florida*, 430 U.S. 349 (1977), and *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978):

> 'The penalty of death is qualitatively different' from any other sentence. [*Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976)]. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.

While the extra degree of reliability sought does not translate into any difference in substantive standards, it implies that courts will take greater procedural precautions. Where there is a way to avoid prejudice, it should be taken. If the "extra degree of reliability" means anything, it means that the courts should bend over backwards to make sure that possible elements of prejudice or discrimination are eliminated.

In Willie Turner's case, it would have been very simple to deal with the threat to that "extra degree of reliability"—the trial judge should have asked the jury questions about any possible racial prejudices. Then, and only then, would we have received the answer to the question that we have posed throughout this case—were any of those people who believe that death is a particularly appropriate punishment for blacks who kill whites on Turner's jury?

This Court should reverse and order a new trial or sentencing hearing for Willie Turner.

Respectfully submitted,

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No. 84-6646

In The

Supreme Court of the United States

October Term, 1984

WILLIE LLOYD TURNER,

Petitioner,

v.

ALLYN R. SIELAFF, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF ON BEHALF OF RESPONDENT

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QUESTION PRESENTED

Whether Petitioner presented the trial court with sufficient facts establishing special circumstances under *Ristaino* v. *Ross*, 424 U.S. 589 (1976), to require specific inquiry on *voir dire* as to possible racial prejudice by any member of the venire?

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No. 84-6646

In The

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WILLIE LLOYD TURNER

Petitioner,

v.

ALLYN R. SIELAFF, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 753 F.2d 342 (1985).

JURISDICTION

The Petitioner asserts that the jurisdiction of this Court is based upon 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

On July 12, 1978, the Petitioner, Willie Lloyd Turner, entered a jewelry store located in Franklin, Virginia, in Southampton County. Using a sawed-off shotgun, Petitioner directed customers and employees to line up against the counter on one side of the store and then forced the proprietor, W. Jack Smith, Jr., to put money from the cash

register into some jewelry bags. (Tr. 119-120).[1] As Smith did so, he activated a silent alarm. A local police officer, A. D. Bain, Jr., then arrived and inquired about the alarm. (Tr. 124). Petitioner surprised Bain and made him surrender his revolver.

At this point Turner fired a pistol shot towards the back of the store, and stated if he saw or heard any additional police officers he was going to start killing those in the store. From a distance of 12 to 15 feet, Petitioner then pointed the gun at Smith and fired without warning or provocation. (Tr. 213). Smith slumped down behind the counter and began bleeding from a head wound. (Tr. 127).

Officer Bain attempted to reason with Turner and promised to carry him out of town if he would not shoot anyone else. Petitioner, however, responded by stating: "I'm going to kill [Smith] for snitching on me." (Tr. 132).

As Smith lay helpless and "gurgling" on the floor behind the counter, Petitioner then shot him two times in the chest in a "rapid fire" manner. (Tr. 133, 214-215). These last two shots, which hit Smith in the chest, caused him to jump. Turner was not "nervous" or "shaking"[2] but rather looked right over the counter as he shot Smith. (December 5, 1979, Tr. 46-48). Smith died of the wounds in his chest, either of which would have been fatal. (Tr. 204-205). Officer Bain was then able to disarm and subdue Turner until other police officers arrived on the scene.

Petitioner was later indicted by the Southampton County grand jury on the charges of capital murder, use of a fire-

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[1] References are to the trial transcript of December 3 and 4, 1979, and will be designated (Tr. ——).

[2] Contrary to Petitioner's assertion (Br. 4) that he "apparently panicked," there is not the slightest indication from any of the eyewitnesses who testified at trial that Petitioner acted in anything other than a deliberate and calculated manner.

arm in the commission of murder, and possession of a sawed-off shotgun in the commission of robbery. Prior to trial, a change of venue was granted at Petitioner's request and the trial was held in Northampton County. Northampton County is non-contiguous to Southampton County and is located on the Eastern Shore of Virginia. Eastville, the place of trial, is approximately 80 miles from Franklin, the location of the murder.

At trial, prior to the commencement of the *voir dire*, Petitioner's counsel raised a number of matters relating to the manner and substance of the *voir dire*. The trial judge ruled that he would question the prospective jurors collectively in groups of five and would then examine them individually as to their views on capital punishment. The trial court further indicated that it would receive questions tendered by each party for possible use during *voir dire*. Petitioner's counsel, in accordance with this ruling, submitted a number of proposed written questions.[3] The trial court declined to ask a proposed question which concerned possible racial prejudice. No reason for propounding this question was advanced. The only reference to race was counsel's separate argument earlier in the proceedings that Virginia's death penalty was being unconstitutionally administered. (J.A. 10-13). In support of this latter proposition, which was made as a matter "of law . . . for the Court to decide," counsel introduced a Northeastern University study dealing with the imposition of the death penalty in five other states. (J.A. 13).

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[3] Both at trial and on direct appeal to the Supreme Court of Virginia, Petitioner attacked for statutory and constitutional reasons the failure of the trial court to permit his attorneys directly to question the prospective jurors as well as its refusal to allow individual *voir dire*. *See Turner* v. *Commonwealth*, 221 Va. 513, 519-22, 273 S.E.2d 36 (1980). In the instant appeal, Petitioner does not attack the correctness of the trial judge's rulings on either of these matters.

While the court did not make any specific inquiry regarding racial prejudice, it did ask a series of questions to determine whether the members of the venire were impartial. The court asked whether they had learned anything regarding the case, whether they had formed any opinion as to Petitioner's guilt or innocence, whether they were related in any way to any person employed as a police officer or other law enforcement official, and whether they or any members of their families had been victims of crime. (J.A. 16; Tr. 44, 51-52, 62, 70-71, 82, 88, 92-93, 96-97). In addition, while in the physical presence of Turner, the jurors were asked questions designed to disclose bias or prejudice including whether they could give Turner a fair and impartial trial. (J.A. 17; Tr. 39-41, 47-48, 55, 65, 85, 94, 98).

The *voir dire* resulted in a jury composed of eight whites and four blacks.[4] The members of the jury elected one of the four black individuals, J. E. Worsley, foreman of the jury. (Tr. 334). During the *voir dire*, a total of 31 jurors were questioned.[5]

From a panel of 20, each party was permitted four peremptory challenges. Additionally, out of a second group of four veniremen, each party was permitted to exercise one further peremptory challenge to select two alternate jurors.[6]

On December 3-4, 1979, Petitioner was tried and con-

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[4] *See* Addendum 1.

[5] Petitioner incorrectly states that 43 jurors were questioned. (Br. 7).

[6] While Petitioner asserts several times in his Brief that the *voir dire* lasted less than two hours, he points to nothing in the record to substantiate this assertion. On the contrary, the transcript states that the *voir dire* began at 11:15 a.m. and continued uninterrupted until 1:50 p.m. (Tr. 40, 102). Thus, the *voir dire* lasted over two and one-half hours.

victed by the jury of all of the offenses charged against him. Thereafter, in the penalty stage of the trial, the Commonwealth introduced evidence setting forth Turner's extensive criminal record.[7] Turner introduced testimony from a psychiatrist that he "was under the influence of mental disturbance while he was committing the crime." Several relatives of Petitioner testified as to his background and character. Thereafter, the jury recommended a sentence of death.

The trial court then ordered a post-sentence report to be prepared. After receiving and considering the report, the court affirmed the jury's recommendation, finding that the sentence was appropriate.

SUMMARY OF ARGUMENT

The Constitution does not grant a criminal defendant an absolute right to compel the trial court to pose specific questions on *voir dire* regarding racial bias simply because the defendant and victim are of different races. *Ristaino* v. *Ross*, 424 U.S. 589 (1976). This is true irrespective of the nature of the offense or the severity of the potential punishment. Only when the issue of race becomes so inextricably linked with the issues that will arise at trial does such an inquiry become constitutionally required. *Ham* v. *South Carolina*, 409 U.S. 524 (1973). Unless the defendant points to particular circumstances akin to those in *Ham*, the trial court discharges its constitutional obligation to assemble an impartial jury by conducting a more gen-

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[7] Prior conviction orders were introduced showing:
September 21, 1970—malicious maiming;
March 22, 1972—escape;
February 12, 1973—unlawful wounding;
September 26, 1973—malicious wounding;
March 21, 1974—second degree murder.

eralized examination concerning the fitness of the prospective jurors.

In this case Petitioner failed to apprise the trial court of any indicium of possible racial bias beyond the mere fact that he was black and the decedent was white. At most, Petitioner pointed to a study dealing with the application of capital punishment in five states other than Virginia. The deficiencies of that particular study have been well documented by the Supreme Court of Virginia and Petitioner himself.

Petitioner has acknowledged that nothing in this case directly suggested racial antagonism, and the *voir dire* established that Petitioner and his crime were unknown in the community where he was tried. To conclude, upon such a paucity of evidence, that Petitioner adequately advised the trial court of any reason necessitating a specific focus on racial bias would effectively contravene this Court's holding in *Rosales-Lopez* v. *United States*, 451 U.S. 182 (1981), that there is no constitutional presumption of any particular kind of racial or ethnic bias on the part of jurors. Equally, the ruling sought by Petitioner would undermine this Court's refusal in *Ristaino* to subscribe to the notion that in this country's heterogeneous society race invariably affects the dispensing of justice.

In this case there was nothing to show that Petitioner's race would possibly play any material role in the jury's deliberations. This is especially true in light of the uncontradicted evidence of Petitioner's guilt and the overwhelming evidence at sentencing. That race did not infect the jury's deliberations is borne out by the fact that four jurors, including the foreman, were black. The conduct of *voir dire* is committed to the sound discretion of the trial court, and there is no basis in this case for concluding that this discretion was abused.

Petitioner's references to historical application of capital punishment prior to *Furman* v. *Georgia*, 408 U.S. 238 (1972), cannot be relied upon to establish a special circumstance under *Ham*. This Court's decisions in *Gregg* v. *Georgia*, 428 U.S. 153 (1976), and *Jurek* v. *Texas*, 428 U.S. 262 (1976), demonstrate that constitutionally drafted statutes can be relied upon to eradicate vestiges of prior improper practices. Moreover, *Gregg* and *Jurek* refute any suggestion that the jury could not constitutionally exercise its statutorily-bestowed discretion in sentencing Petitioner unless it was first explicitly examined as to racial bias.

The statistical studies relied upon by Petitioner are seriously flawed and do not purport to measure how capital punishment is being administered in Virginia. There exists no basis upon which this Court can conclude that capital punishment is being discriminatorily applied in Virginia or that the jury selected in this case was racially prejudiced.

Petitioner does not challenge the general applicability of *Ristaino*, and the validity of that decision is not now in dispute. This Court should not announce a new constitutional rule which even Petitioner does not seek. To require a *per se* rule would inevitably lead to similar inquiries on such marginally related matters as the venire's sexual, political and religious views. Such an approach would be unwise, as it would substantially eliminate the trial judge's traditional discretion to conduct *voir dire* and, at the same time, it would unnecessarily permit overly intrusive examination of the jurors' purely personal beliefs.

ARGUMENT

I.

The Trial Court Did Not Abuse Its Discretion By Declining To Ask The Venire A Specific Question Concerning Racial Prejudice.

This Court examined the question of whether the failure of a state trial judge to examine prospective jurors on *voir dire* as to possible racial prejudice violated a defendant's constitutional rights in *Ham* v. *South Carolina,* 409 U.S. 524 (1973). Ham was a young black man well-known in his community for his work in civil rights activities. His basic defense at trial was that law enforcement officers were "out to get him" because of his civil rights activities, and that he had been framed on the charges.

Prior to *voir dire* examination of prospective jurors, counsel for Ham requested the judge to ask several questions addressed to the possibility of racial prejudice.[8] The trial judge declined to ask these specific questions requested by Ham, but did pose three general questions as to bias, prejudice or partiality specified by state law.

Within this factual framework, this Court concluded:

> [W]e think that the Fourteenth Amendment required the judge *in this case* to interrogate the jurors upon the subject of racial prejudice. South Carolina law permits challenges for cause, and authorizes the trial judge to conduct *voir dire* examination of potential jurors. The State having created this statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that *under the facts shown*

[8] The questions sought to be asked were: "1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race? 2. You have no prejudice against Negroes? Against black people? You would not be influenced by the use of the term black?"

> *by this record* the petitioner be permitted to have the jurors interrogated on the issue of racial bias.

Ham v. *South Carolina*, 409 U.S. at 527 (emphasis added).

The ruling in *Ham*, however, did not establish a constitutional rule of universal applicability. In *Ristaino* v. *Ross*, 424 U.S. 589 (1976), this Court made explicitly clear that only in instances where issues of race are "inextricably bound up with" the issues that will arise at trial is a state court constitutionally required to inquire specifically as to the possibility of racial prejudice. *Id.* at 597. In *Ristaino*, this Court held that "[t]he mere fact that the victim of the crimes alleged was a white man and the defendants were Negroes was less likely to distort the trial than were the special factors involved in *Ham*." *Id.* at 597. In the absence of special circumstances comparable to those in *Ham*, "the State's obligation to the defendant to impanel an impartial jury generally can be satisfied by less than an inquiry into a specific prejudice feared by the defendant." *Id.* at 595 (footnote omitted).

Racial issues infected the entire trial in *Ham*. Racial bias was the essence of the defense and was inescapably before the jurors. Ham's civil rights activities were known in the community, and any latent bias harbored by the jurors would likely be activated by the case and would render his defense ineffectual. Thus, when the racial issues were so salient and the defendant, himself, was a special target for prejudice, the due process clause entitled Ham to have the judge examine jurors specifically for racial prejudice.

In contrast, Petitioner in this case conceded in the Fourth Circuit that there was "nothing special in the facts surrounding this case to suggest racial antagonism." *Turner* v. *Bass*, 753 F.2d 342, 346 (4th Cir. 1985). (*See also* J.A.

32). The racial identities of the defendant and victim, without other factors underscoring the racial elements of the case and their specific application to the defendant, are insufficient to invoke the special precautions of *Ham*.

The Constitution does not require that a specific procedure be utilized on *voir dire* to determine the impartiality of jurors. It is within the sound discretion of the trial judge to determine the precise procedure and questions to be asked to assure impartiality. *Ham* v. *South Carolina*, 409 U.S. at 527-528. As observed by this Court in *Ristaino* v. *Ross*, 425 U.S. 594-595:

> The Constitution does not always entitle a defendant to have questions posed during *voir dire* specifically directed to matters that conceivably might prejudice veniremen against him. *Ham, supra*, at 527-528. *Voir dire* "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion." *Connors* v. *United States*, 158 U.S. 408, 413 (1895); *see Ham, supra*, at 527-528; *Aldridge* v. *United States*, 283 U.S. 308, 310 (1931). This is so because the "determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge." *Rideau* v. *Louisiana*, 373 U.S. 723, 733 (1963) (Clark, J., dissenting).

This Court has recently reaffirmed that the determination of juror impartiality is within the province of the trial judge in *Patton* v. *Yount*, 467 U.S. ——, 104 S.Ct. 2885 (1984), and *Wainwright* v. *Witt*, —— U.S. ——, 105 S.Ct. 844 (1985).

In the instant case, the trial judge conducted the *voir dire* after receiving input from counsel.[9] (J.A. 13-15;

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[9] The manner in which *voir dire* was conducted is consistent with that in federal courts. Rule 24(a), *Fed. R. Crim. P.*

Tr. 14, 25). Petitioner requested the trial court to ask a number of questions, including one[10] concerning racial prejudice. While asking nine of the fourteen questions ultimately proposed by Petitioner, the trial judge declined to address any specific question of racial prejudice to the veniremen.

When the question concerning racial prejudice was proposed, the prosecutor responded by pointing out that "this is not a rational [sic] case. There are no rational [sic] overtones in the allegations of this case. It's a simple case of whether or not the defendant committed murder in the commission of robbery. The fact that you have got people of different races—victim and perpetrator—is of no consequence and I don't think is a proper question of inquiry for the jury." (J.A. 14).[11]

Petitioner offered no reason to the trial judge in support of the proposed question on racial prejudice.[12] Nothing was shown to cause the trial judge to inquire into possible prejudice against Turner because he was black. Some presentation of facts suggesting racial prejudice is essential before a defendant in a criminal case is automatically entitled to have *voir dire* focus on possible racial prejudice

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[10] Question 10 read: "The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?"

[11] In the context of this colloquy, it is clear that the prosecutor was using the word "racial" rather than "rational" as transcribed.

[12] The Supreme Court of Virginia seems to have credited Petitioner with introducing the study of Bowers and Pierce (1979) in support of his proposed question on racial prejudice. *Turner* v. *Commonwealth*, 221 Va. 513, 523, 273 S.E.2d 36, 42 n.9 (1980). A careful review of the record, however, reveals that the study was presented to support Petitioner's argument on the unconstitutionality of the death penalty statutes and was unconnected in any way with the proposed question on racial prejudice. (Tr. 7-13, 27-34).

because this Court, in *Rosales-Lopez* v. *United States*, 451 U.S. 182 (1981), noted that "[t]here is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups." *Id.* at 190.

That this Court deems it incumbent upon a defendant to bring to the attention of the trial court those factors which the defendant contends necessitate inquiry into racial prejudice is demonstrated by *Ristaino*. There, a black defendant was charged with a violent crime against a white security guard. The trial judge denied defendant's motion that a question specifically directed to racial prejudice be asked during *voir dire* in addition to customary questions directed to general bias or prejudice. The trial court asked counsel if there was anything peculiar about the case calling for such a special inquiry. Counsel responded, "No, just the fact that the victim is white, and the defandants are black." 424 U.S. at 591.

This court held there that a difference in race between defendant and victim was insufficient to trigger specific questioning as to racial prejudice. The Court further found that the defendant had failed to carry his burden of justifying such questioning when it observed, "Ross was unable to support his motion concerning *voir dire* by pointing to racial factors such as existed in *Ham* or others of comparable significance." 424 U.S. at 598.

There is no *per se* constitutional rule requiring inquiry as to racial prejudice in cases involving a crime of violence between a black assailant and a white victim. *Id.* at 596 n.8. This Court has reasoned:

> Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors'

> ability to deal impartially with this subject amount to an unconstitutional abuse of discretion.

Rosales-Lopez v. *United States*, 451 U.S. at 190.

A trial judge necessarily acts upon information presented to him, but in this case counsel for Turner made no statement with reference to any peculiar or special circumstance calling for a specific inquiry into racial prejudice. Therefore, in the instant case no special circumstances were brought to the attention of the trial judge, nor do any exist. There was no indication that Turner might have been a special target for racial prejudice, and his defense on the merits was solely an effort to undermine the state's case through cross-examination. Turner did not testify, so his credibility did not become an issue. There was nothing about this case to require the special precaution of *Ham*.

With all members of the venire present, Petitioner stood while the indictment was read and requested to be tried by jury. (Tr. 40-43). Thus, at a time when Petitioner's race was readily apparent,[13] the trial judge asked the veniremen, among other questions:

> "Do any of you know any reason whatsoever why you cannot render a fair and impartial verdict in these cases, either for the defendant or for the Commonwealth of Virginia?
>
> Do any of you know why you cannot render an impartial verdict in this case?"

(Tr. 47, 55, 65, 85, 94, 98).[14]

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[13] Because Turner was physically present, all prospective jurors in this case were aware of Turner's race when they underwent *voir dire* whereas, in *Ristaino* the record failed to disclose whether all veniremen knew that the defendants were blacks. *Ristaino* v. *Ross*, 424 U.S. at 593 n.5.

[14] These questions are required by Rule 3A:14(a), Rules of the Supreme Court of Virginia.

These questions were adequate to determine impartiality and lack of prejudice in the absence of any special circumstances like *Ham*, and there was consequently no abuse of discretion in refusing to make a special inquiry into racial prejudice.

The implications of Petitioner's argument, if accepted, would lead this Court to adopt a *per se* rule in capital cases. His thesis appears to be that in every capital case conducted in a state where the death penalty historically had been imposed in a racially disproportionate manner, the trial court must grant a black defendant's request to query the veniremen about racial prejudice where the victim is white. This is but another variation of the theme "capital murder is itself a special circumstance" as proposed by Petitioner in both the Supreme Court of Virginia and the Fourth Circuit.

This Court reflected an aversion to the adoption of a *per se* rule in *Ristaino*, 424 U.S. at 596 n.8:

> In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion. *See Connors* v. *United States*, 158 U.S. 408, 415 (1895).

The adoption of a rule based solely upon a perspective of historical discrimination could not be limited to race but would apply with equal force to questioning about religious affiliation, ethnic origin, sex or national origin. This Court should decline Petitioner's seeming invitation to adopt a *per se* rule in capital cases.[15]

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[15] This Court has resisted the lure to carve out a separate body of law for capital cases in other areas. *See, e.g., Strickland* v. *Washington*, —— U.S. ——, 104 S.Ct. 2052 (1984) (standard for de-

It is highly significant, however, that Petitioner does not attack the general validity of *Ristaino*. As he acknowledges, *Ristaino*, along with *Ham*, requires a "case-by-case" approach as to possible racial prejudice.[16] (Br. 10-12).

Respondent further submits that this Court should not overrule *Ristaino* and announce a new *per se* constitutional rule. Once this Court starts down the road of requiring specific examination on *voir dire* as to a juror's racial attitudes, there will be no principled way for it not to promulgate similar rules in a host of other settings. Under Petitioner's analysis, no reason suggests itself as to why similar inquiry would not be mandatory in such areas as the venire's political, religious and sexual attitudes. Certainly, historical patterns of discrimination might be shown as to all of these matters. Yet, this approach flies in the face of this Court's emphasis in *Ristaino* upon the pluralistic nature of our country.

Furthermore, a *per se* rule would raise numerous practical difficulties. Petitioner, for example, provides no explanation as to why an individual who refuses to be candid in responding to a general question regarding bias would at the same time truthfully answer a more specific inquiry. Further, complex questions would arise in the cases of

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termining ineffective counsel is the same for capital and non-capital cases); *Barefoot* v. *Estelle*, —— U.S. ——, 103 S.Ct. 3383 (1983) (no constitutional barrier to applying the ordinary rules of evidence in capital cases); *Wainwright* v. *Witt*, —— U.S. ——, 105 S.Ct. 844 (1985) (traditional standard for determining a venireman's impartiality should be applied in capital cases).

[16] This is in sharp contrast with trial counsel's argument, as interpreted by the Supreme Court of Virginia, that the proffered racial question should be submitted as a "matter of law." (J.A. 13). The very fact that Petitioner took this position at trial demonstrates that the requirements imposed by *Ham* and *Ristaino* upon criminal defendants to apprise the trial court of special circumstances were not likely to be satisfied in this case.

white-on-black crimes and prosecutions of multiple black defendants.[17] Additionally, Petitioner does not propose how and when the venire would be informed of the decedent's race. These problems illustrate the weaknesses inherent in Petitioner's argument and demonstrate that the Court should not on its own initiative overrule *Ristaino*.

ARGUMENT

II.

Petitioner Failed To Establish A Special Circumstance Requiring Inquiry Into Racial Prejudice

While admitting that there is nothing special in the facts surrounding this case to suggest racial antagonism, Petitioner nevertheless sets forth a listing of ten factors which he suggests are substantial indications of the likelihood of racial prejudice affecting the jurors. Although the only factor arguably brought to the attention of the trial judge was the study of Bowers and Pierce, none of the factors requires adoption of Petitioner's thesis.[18]

A.

The Race of the Victim and the Defendant.

There has never been any question that the defendant is black and the victim was white. This circumstance, however, has not been treated as a special circumstance under *Ham*. *See Ristaino* v. *Ross*, 424 U.S. at 597.

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[17] *See Commonwealth* v. *Lumley*, 367 Mass. 213, 327 N.E.2d 683, 686 (1975).

[18] Some of Petitioner's factors are closely related and have been joined together for argument purposes.

B.

Historical Background

Petitioner commits a considerable portion of his brief to to a discussion of the death penalty as it existed prior to this Court's decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972). Whatever may be said about the historical usage of capital punishment, such a discussion is not relevant to the manner in which capital punishment is being imposed today. As this Court observed in *Gregg* v. *Georgia*, 428 U.S. 153, 195 (1976):

> [T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

See also Proffitt v. *Florida*, 428 U.S. 242, 253 (1976); *Jurek* v. *Texas*, 428 U.S. 262, 276 (1976).

At a minimum this Court's decisions in *Gregg, Proffitt* and *Jurek* stand for the proposition that states may separate themselves from historical backgrounds concerning capital punishment by the enactment of statutory schemes which provide focused attention on the particular defendant and his crime.[19] Since 1977, Virginia has been proceeding under such a constitutional scheme and must be judged upon the manner in which the death penalty is presently being imposed rather than upon what may have occurred in the distant past.[19]

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[19] The procedure for the trial of capital cases is found in Va. Code §§ 19.2-264.2 to 264.5 (1950).

At trial Petitioner introduced a study by Bowers and Pierce, "Preliminary Tabulations Reflecting Arbitrariness and Discrimination Under Post-*Furman* Capital Statutes" (1979). As found by the Supreme Court of Virginia, this study "was based upon statistics compiled in other states [than Virginia] and thus was of little utility in establishing the potential of prejudice in Virginia." *Turner* v. *Commonwealth,* 221 Va. at 523, 273 S.E.2d at 42 n.9 (1980). The studies upon which Petitioner relies lose any force for persuasion when exposed to the harsh realities of facts. Such studies have been severely criticized in other cases as will be developed in depth *infra.*

C.

Voir Dire.

Petitioner argues that the *voir dire* was inadequate to insure an impartial jury.[20] He further asserts that this inadequacy was compounded by dissimilarities between Southampton County, the situs of the crimes, and Northampton County, the place where the trial occurred. None of these factors demonstrates that a special circumstance existed as contemplated by *Ham.*

Petitioner suggests there exists some fundamental sociological distinction between Southampton and Northampton Counties, but this is not borne out by available information.[21] According to the 1980 Official Census, the adult

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[20] Petitioner had argued in other courts that the allegedly cursory *voir dire* and the inability of counsel to directly examine the veniremen had prevented effective use of peremptory challenges. Petitioner abandoned these claims in the Fourth Circuit. This can only be regarded as an acklowledgement that, apart from the trial court's refusal to inquire about racial prejudice, *voir dire* was otherwise sufficient. It is manifest that the Fourth Circuit was not afforded the opportunity to consider the claimed significance of these matters.

[21] Petitioner's wholly unsubstantiated assertion that Southampton County is somehow more cosmopolitan and "a bit closer to the main-

population in Southampton County was 13,545. Of this total 6,290, or 46.4%, were black. Bureau of Census, *1980 Census of Population,* Vol. 1, Chapter B, Part 48 (Virginia) (1982). Comparable figures for the same time period show that in Northampton County the adult population was 10,629. Of this number 4,934 were black for an identical percentage of 46.4. This was not a case where the change of venue resulted in Petitioner being tried in a hostile environment. This is further reflected by the fact that Petitioner's jury included four blacks, one of whom was elected foreman.

Petitioner's claim that *voir dire* was cursory has a hollow ring in view of the record. The trial court solicited input from counsel on questions to be submitted on *voir dire* to the entire venire. Turner's counsel submitted fourteen questions. When requested by the trial court if counsel had other questions they wished to propose, counsel remained silent. (Tr. 33). Obviously, counsel did not believe additional questioning was necessary under the circumstances of this case. Subsequently, the trial court exhibited a willingness to recall individual jurors in order to clarify their prior responses. (Tr. 65-68; 85). It is clear that *voir dire* was as thorough as necessary under the circumstances of this case.

Petitioner repeatedly asserts that *voir dire* lasted less than two hours when the record reflects it consumed in excess of

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stream of Virginia life and politics" is, apart from being irrelevant, incorrect. (Br. 23). At the time of trial, Northampton County was only marginally less populated and had a significantly greater population density (66.5 versus 31.1 persons per square mile) than Southampton County. Eastville, the site of Petitioner's trial, is physically closer to Virginia Beach, the most populous city in Virginia, than Franklin, the situs of the murder. Further, while hardly crucial to the disposition of this case, the one-way fare on the Chesapeake Bay Bridge Tunnel is $9.00, not $20.00 as claimed by Petitioner. (Br. 23).

two and one-half hours. He also points to the fact that only 6 veniremen were removed for cause as compared to 18 in *Ristaino*. Apart from helping to explain why *voir dire* did not require more time, this factor militates in favor of the trial court's refusal to examine specifically on racial bias.

In *Murphy* v. *Florida*, 421 U.S. 794 (1975), this Court, in rejecting a defendant's claim that his right to a fair trial had been violated as a result of extensive pretrial publicity, pointed out that during *voir dire* only 20 of the 78 veniremen examined had been excused because they had formed an opinion as to the defendant's guilt. The *Murphy* Court contrasted that case with the *voir dire* in *Irvin* v. *Dowd*, 366 U.S. 717 (1961), where more than 90 percent of those questioned expressed in varying degrees of intensity an inclination to believe in the defendant's guilt, and the court had excused for cause 268 out of 430 jurors. This Court then stated in *Murphy*:

> In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may have unwittingly been influenced by it. . . . [The disqualification of 20 out of 78 veniremen] by no means suggests a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own.

421 U.S. at 803.

These observations apply with even greater force in the present case. The change of venue was to, in Petitioner's words, a "tranquil", non-contiguous jurisdiction. (Br. 23). The *voir dire* demonstrated that the veniremen were wholly ignorant of the facts underlying the murder. None

of the veniremen revealed the slightest familiarity with Petitioner or the victim. The atmosphere was free of racial tension and any suggestion to the contrary is rebutted by the fact that a black was elected foreman of the jury, a majority of whom were white. The record in this case is simply devoid of any indications that racial prejudice was such a likely factor that it had to be dealt with in a special way as in *Ham*. Petitioner's references to the actions of a handful of individuals in Richmond some five years after Petitioner's trial at a time when two Richmonders, notorious in that community for their rash of brutal crimes, were being executed cannot alter the fact that his own case is devoid of any indication of racial prejudice.[22]

Under these circumstances, this Court's admonition in *Ham* and *Ristaino* that *voir dire* normally need not be conducted in any particular fashion is especially apt. Any suggestion by Petitioner that the questions put to the venire were insufficient to uncover their biases is groundless. In *Murphy* this Court implicitly recognized that jurors' expressions of impartiality should normally be respected, particularly where, as here, the record establishes that the community as a whole bears no animus toward the defendant.

That specific inquiry into racial prejudice is not required

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[22] The trial in *Ristaino* was conducted in Boston in 1970. The jury, which consisted of 10 whites and 2 blacks, *see Commonwealth* v. *Ross*, 363 Mass. 669, 296 N.E.2d 810, 815 (1973), was chosen at a time when the City of Boston was experiencing well-documented racial tensions in connection with an on-going controversy surrounding school desegregation. *See, e.g., Morgan* v. *Hennigan*, 379 F. Supp. 410, 414-30 (D. Mass.), *aff'd sub nom. Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). If Petitioner's analysis in this case—which attempts to challenge the trial judge's ruling on the basis of actions far removed in time and distance—were correct, it is difficult to understand how this Court could have arrived at its disposition in *Ristaino*.

even where historical prejudice is shown is demonstrated by *Dukes* v. *Waitkevitch,* 536 F.2d 469 (1st Cir)., *cert. denied,* 429 U.S. 932 (1976). There, the Court of Appeals held that a black defendant, accused with other blacks of raping two white women, was not entitled to habeas relief despite the trial court's refusal to pose questions during *voir dire* regarding racial prejudice. Rejecting a historical argument much like that being presently advanced—that charges of interracial rape have historically exacerbated racial prejudice to an extreme degree—the First Circuit concluded that *Ristaino,* not *Ham,* controlled. The Court concluded that even though "interracial rape may be a classic catalyst of racial prejudice," it was not the confrontation between persons of different races which required special *voir dire* on racial bias. *Id.* at 470. Rather, the court explained, "[I]t was the racial overtones of Ham's civil rights activities and his 'frame-up' defense—discrete trial issues '[which] were likely to intensify any prejudice the individual members of the jury might harbor.' " *Id.* at 470 (quoting *Ristaino* v. *Ross,* 424 U.S. at 597).

Petitioner also complains that he was allotted too few peremptory challenges and was forced to select the jury on the basis of hunches and surmise. Petitioner has never in any other court raised the slightest suggestion as to any inadequacy in the number of peremptory challenges authorized by Virginia law. Rather, he has merely contended that he was forced to exercise his challenges on the basis of too little information. As noted, Petitioner's counsel never requested the trial court to ask additional questions, and it is much too late to make such an assertion.

This Court has stated many times that peremptory challenges are not constitutionally obligatory. *See Rosales-Lopez, supra,* 491 U.S. at 188; *Swain* v. *Alabama,* 380

U.S. 202, 219 (1965). Moreover, the mere fact that the asking of additional questions is "helpful" to an attorney in deciding how to exercise his peremptory challenges hardly demonstrates its constitutional basis. As the Second Circuit observed in *United States* v. *Gibbons*, 602 F.2d 1044 (1978), *cert. denied*, 444 U.S. 950 (1979):

> [T]he right of the peremptory challenge does not command a right to the peremptory question. Whatever the attorney's power to strike a number of venirepersons at will may be, to recognize a correlative right to question at will—without in any way identifying the motivating concern—would strip the judge of his control over the proceedings. Any question could be labeled necessary for some unspoken element in the decision to challenge peremptorily.

602 F.2d at 1051.

It is not, after all, the prospective jurors who are on trial in the cases which come before the courts. As counsel seek more and more information to aid in filling the jury box with persons of a particular type whom they believe to be well disposed toward their clients, prospective jurors will be less than willing to serve if they know that unnecessary inquiry into their essentially private concerns will be pressed. As long as a defendant's rights are protected by a *voir dire* designed to uncover bias and impartiality, then reasonable limitations on the questioning should not be disturbed.

D.

Jury Discretion

While recognizing that this Court has authorized giving the sentencer broad discretion in capital cases, Petitioner

urges that a special circumstance under *Ham* is somehow made out by the fact that the jury's recommendation of sentence is virtually conclusive. His argument seems to be premised upon an unfounded assumption that Virginia trial and appellate courts are not properly performing their review functions.

In response to this Court's decisions in *Gregg, Jurek* and *Proffitt,* the Virginia legislature enacted a statutory scheme considerably narrowing the circumstances under which capital punishment is authorized. Like Texas, Virginia has narrowed the categories of murders for which a death sentence may be imposed.[23] Additionally, Virginia law requires that the jury at the penalty stage find either of two specific aggravating circumstances proven beyond a reasonable doubt before the death penalty can be imposed.[24] The Virginia Supreme Court has held that, notwithstanding proof of aggravating circumstances, the jury is at liberty under the capital sentencing statute to recommend life im-

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[23] Va. Code § 18.2-31, defines capital murder as the willful, deliberate and premeditated killing in any of eight situations, *i.e.,* (1) during an abduction with intent to extort money or a pecuniary benefit; (2) for hire; (3) by a prisoner; (4) during a robbery while armed with a dangerous weapon; (5) during rape; (6) of a law-enforcement officer for the purpose of interfering with the performance of his official duties; (7) of more than one person as a part of the same act or transaction; (8) of a child under the age of twelve years during an abduction with intent to extort money or a pecuniary benefit or with intent to defile.

[24] These aggravating circumstances are:

1. "that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society;" or
2. "that his conduct in commiting the offense . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim."

Va. Code § 19.2-264.2(1).

prisonment. *Smith* v. *Commonwealth,* 219 Va. 455, 248 S.E.2d 135, 150 (1978), *cert. denied,* 441 U.S. 967 (1979).

Virginia's capital punishment statutes are substantially similar to those upheld by this Court in *Gregg* v. *Georgia, supra,* and *Jurek* v. *Texas, supra.* In each of these cases, this Court concluded that the jury's discretion was constitutionally exercised. In *Gregg,* it was determined that the discretion exercised by the jury was " 'controlled by clear and objective standards so as to produce non-discriminatory application.' " 428 U.S. at 198 (quoting *Coley* v. *State,* 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974)). Likewise, in *Jurek,* this Court characterized the Texas scheme as one that "guides and focuses the jury's consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." 428 U.S. at 274. Accordingly, irrespective of whatever level of discretion a capital jury in Virginia is deemed to possess, the Virginia statute insures that this discretion will be exercised in a constitutional manner.

Under Virginia's capital punishment scheme, when the punishment of any person has been fixed at death, the trial judge is required to order a post sentence report and must then determine whether the sentence of death is appropriate.[25] This review by the trial judge is a guard against the arbitrary and discriminatory imposition of a sentence of death. The trial judge, having observed all facets of the trial, stands in the best position to know whether the death sentence has been imposed on the basis of some arbitrary factor, and the trial judge is authorized to impose a sentence of life imprisonment in any case. This review procedure by Virginia trial judges stands in contrast to that of Georgia and Texas where the trial judge

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[25] Va. Code § 19.2-264.5.

is bound by the jury's sentence. *See Gregg* v. *Georgia,* 428 U.S. at 166; Tex. Code Crim. Proc. Ann., art. 37.071 (Vernon 1981).

Petitioner's criticism that Virginia trial judges rarely interfere with a jury's recommendation of a sentence of death, rather than establishing a special circumstance to require inquiry into racial prejudice, in fact strengthens Respondent's position. The fact that Virginia trial judges have the authority to impose a life sentence where the jury has recommended death provides a greater procedural safeguard against discriminatory application than the procedure approved by this Court in *Gregg.*[26]

Petitioner's claim that the Virginia Supreme Court has failed to perform meaningful appellate review of capital cases is both regrettable and unsupported by the record. In every capital case, including Petitioner's, the Virginia Supreme Court has conscientiously performed its statutory mandate to review every sentence of death for arbitrariness and disproportionality.[27] The lack of success by defendants in attacking their death sentences is not equivalent to an absence of meaningful appellate review by the Virginia Supreme Court. Significantly, Petitioner has not referred this Court to a single case to support his bald assertion of

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[26] Petitioner's statement that in only 2 out of 39 cases has the judge refused to impose a jury-recommended death sentence appears to be correct. (Br. 31 and n.6). His statement that both cases involved white defendants is incorrect. Robert McClark is black.

[27] Va. Code § 17-110.1 mandates automatic appellate review of death sentences by the Supreme Court. The Court must consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and
2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

inadequate review.[28] Because the Virginia Supreme Court has not found any death sentence to be excessive or arbitrary does not supply Petitioner cause to malign that court. A cursory reading of the facts involved in capital cases in Virginia would convince even the most skeptical that Virginia reserves the death sentence for the most egregious circumstances.

Capital murder in Virginia is so narrowly circumscribed as to weed out marginal cases at the outset. To come within the statutory ambit of capital offenses, the murder must generally be accompanied by another crime, which is itself considered by society to be quite serious, *i.e.*, rape, armed robbery, abduction, multiple murder. The other special circumstances necessary to elevate a murder to a capital offense, *i.e.*, murder for hire, killing a law-enforcement officer to prevent the performance of official duties, and murder by an inmate, while not involving additional crimes, concern matters which strike at the very heart of civilized society. Moreover, a sentence of death cannot be imposed merely upon proof of one of these special categories of murder. The Virginia scheme also requires the state to prove beyond a reasonable doubt either that the defendant poses a future danger or that the crime was vile.[29]

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[28] The Fourth Circuit has reviewed five cases from Virginia involving a sentence of death and has yet to find a single cause for reversal.

[29] In *Commonwealth* v. *Ronald Thatcher,* Circuit Court City of Williamsburg, Docket No. 2937, the defendant was convicted of capital murder of a law-enforcement officer. The Commonwealth, however, never sought a death sentence for it could prove neither of the aggravating circumstances. The defendant had only a minor criminal record, and the victim was killed with a single shot. *See Smith* v. *Commonwealth,* 219 Va. 445, 478, 248 S.E.2d 135, 149 (1979), *cert. denied,* 441 U.S. 967 (1979). (A single shot, not being more culpable than the minimum necessary to accomplish an act of murder, is insufficient to establish an "aggravated battery").

Because Virginia capital punishment statutes are more circumscribed than most, if not all, similar statutes, much of the discretion given to juries in other states is necessarily eliminated in Virginia at the outset. The very fact that a defendant in Virginia convicted of capital murder will have to have committed a homicide far more aggravated than most murders, combined with the fact that at least one of two aggravating circumstances must also be proven, makes it much less likely that an appellate court will find the penalty disproportionate or the result of passion or prejudice. Thus, it is not surprising that the Supreme Court of Virginia has not reversed a death sentence on this ground. It is highly significant, however, that three of four reversals by that Court involved a sustaining of the defendant's argument that the *voir dire* had been inadequate to insure a fair jury.[30]

E.

Mid-Range Case.

Petitioner suggests that there is a significant likelihood that racial biases will affect a jury's decision on sentencing in a mid-range case. Petitioner is incorrect in assuming that his case falls within the mid-range, and his reliance upon events which occurred over two decades ago is inappropriate.

This case is far more than Petitioner's characterization of "a bungled robbery." (Br. 13). Petitioner's killing of Mr. Smith was nothing less than a cold and calculated execution. Mr. Smith, after receiving a head wound, lay helpless on the floor. He posed no threat to Petitioner and was

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[30] *See Justus* v. *Commonwealth*, 220 Va. 971, 266 S.E.2d 87 (1980); *Martin* v. *Commonwealth*, 221 Va. 436, 271 S.E.2d 123 (1980); *Patterson* v. *Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981).

in no position to interfere with an escape by Petitioner. Not satisfied with having rendered Mr. Smith immobile, Petitioner set out to exact the most evil sort of revenge upon Smith for his having activated a silent alarm. Petitioner's subsequent shooting of Mr. Smith was not the result of an accident or panic but was intentional and punitive. The murder of Mr. Smith was by any reckoning "vile." Moreover, Petitioner's past record established a complete disregard for human life. In the span of four years he had murdered another person and had engaged in three other episodes where he seriously threatened human life. Petitioner's record for violence was unquestionably serious and can hardly be characterized as mid-range.

Petitioner's reliance upon the Baldus study utilized in *McCleskey* v. *Zant*, 580 F. Supp. 338 (N.D. Ga. 1984), *rev'd on other grounds sub nom. McCleskey* v. *Kemp*, 753 F.2d 877 (11th Cir. 1985), is misplaced. Petitioner refers to the conclusion in the Baldus study that mid-range cases were the ones in which the influence of racial prejudice was greatest.[31] The study, which focused on the race of the crime victim, concluded that on average a white victim crime was 6% more likely to result in a death sentence than a comparable black victim crime. This race-of-the-victim effect was said to increase to 20% in cases involving mid-range levels of aggravation. In finding no support for this conclusion of racial effect, the Eleventh Circuit said:

> [T]he figure reflects that the variables included in the study do not adequately explain the 20% disparity and that the statisticians can explain only by *assuming* the racial effect. More importantly, Baldus did not testify that he found statistical significance in the 20%

[31] "Baldus did not purport to define the mid-range cases; nor is such a definition possible." *McCleskey* v. *Kemp*, 753 F.2d at 898.

> disparity figure for mid-range cases, and he did not adequately explain the rationale of his definition of the mid-range cases. His testimony leaves this Court unpersuaded that there is a rationally classified, well-defined class of cases in which it can be demonstrated that a race-of-the-victim effect is operating with a magnitude approximating 20%.

McCleskey v. *Kemp*, 753 F.2d at 898 (emphasis added). Even if Petitioner's case were to be classified in the mid-range, there is no evidence to support his proposition that racial prejudice affects the sentence in such cases.

Petitioner's reference to lynchings which occurred in this country over twenty years ago has no relevance in light of contemporary society. Petitioner himself acknowledges that the racial climate in this country has continued to change for the better. (Br. 35). Thus, a more restrictive rule than that established in *Ristaino* would be unwarranted. That society has progressed from the vestiges of the past was noted by Justice Powell in *Furman*:

> The possibility of racial bias in the trial and sentencing process has diminished in recent years. The segregation of our society in decades past, which contributed substantially to the severity of punishment for interracial crimes, is now no longer prevalent in this country. Likewise, the day is past when juries do not represent the minority group elements of the community. The assurance of fair trials for all citizens is greater today than at any previous time in our history.

Furman v. *Georgia*, 408 U.S. 238, 450 (1972) (Powell, J., joined by Burger, C.J., Blackmun and Rehnquist, J.J., dissenting).[32]

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[32] State law mandates that jury lists be prepared by random selection techniques. Va. Code § 8.01-345.

Petitioner asks whether he had a right to know if racially biased individuals were on his jury. Not only Petitioner, but all defendants, are guaranteed this right. The *voir dire* conducted in this case was sufficient to address this issue and was consistent with the *voir dire* approved by this Court in *Ristaino*.

F.

Disproportionality

Petitioner has maintained that he does not ask this Court to assume or presume anything. (Br. 12). Yet, that is precisely what he seeks. He asks the Court to assume that the conclusions contained in the study by Bowers and Pierce are applicable to Virginia even though the statistics which give rise to the conclusions bear no relationship to how capital punishment is being administered in Virginia. He also urges the Court to presume the validity of the Gross and Mauro study, *Patterns of Death: An Analysis Of Racial Disparities In Capital Sentencing And Homicide Victimization* (unpublished study) (October, 1983), as it applies to Virginia even in the face of the authors' own admonitory statement in the study that

> [a] word of caution is in order. As we go down the list of states from Oklahoma to Arkansas our data became increasingly attenuated. Our study includes 43 death sentences in Oklahoma, 27 in North Carolina, 22 in Mississippi, 19 in Virginia and 15 in Arkansas. Considered in isolation, such small numbers make any sentencing patterns hard to discern: only very strong effects can be seen clearly with so few observations. *Some of the racial disparities that we report would not, on their own, constitute convincing proof of racial discrimination; that is particularly true for Arkansas and Virginia, in each of which we studied fewer than twenty death sentences.*

(J.A. 34) (emphasis added). The authors further found that "[i]n Virginia and Arkansas the race of the victim had less pronounced and statistically non-significant effects." (J.A. 37).

The study by Gross and Mauro (Study) suffers from a fundamental deficiency. It utilizes overly general information from which to draw specific findings. The data base from which the statistics relating to Virginia are drawn is seriously flawed. The Study is based upon all homicides, not just those for which capital punishment is statutorily authorized. The homicide figures used in the Study include first and second degree murders and manslaughters for which defendants are never eligible to receive a sentence of death. The Study, therefore, is comparing capital murders with deaths from motor vehicle accidents, family disputes and the like. The raw data selected for the statistical study bear no relationship to capital cases actually presented for trial in Virginia. The inclusion of cases in which the defendant is never eligible for a sentence of death invalidates the conclusion of the Study purporting to find racial discrimination in death sentences. The court in *Shaw* v. *Martin*, 733 F.2d 304, 312 (4th Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 555 (1984), found a similar study conducted by Dr. Raymond Paternoster invalid for this very reason.

Moreover, the Study lacks statistical validity because it does not adequately compare murders of similar atrocity. *See Shaw* v. *Martin*, 733 F.2d at 312. The Study arbitrarily classifies homicides by the use of three factors, *i.e.*, the commission of a homicide in the course of another felony, the killing of a stranger, and the killing of multiple victims. These factors bear little or no relationship to the Virginia capital murder scheme. For example, the deliberate murder in the commission of a burglary is not a

capital offense in Virginia. The relationship between the defendant and the victim is unimportant, and the killing of multiple victims was not made a capital offense until 1981, a year after the latest figures used in the Study. The Study does not take into account the statutory aggravating factors. *See McCorquodale* v. *Balkcom*, 705 F.2d 1553, 1556 (11th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 2161 (1984). No incidents resulting in not guilty verdicts were removed from the raw data. In short, the Study fails to measure capital punishment in Virginia.

There are "countless racially neutral variables" involved in the sentencing of capital cases. *Smith* v. *Balkcom*, 671 F.2d 858, 859 (5th Cir.), *cert. denied*, 459 U.S. 882 (1982). There is little likelihood that generalized studies will be developed which would exclude every possible factor which might account for differences between crimes and defendants, exclusive of race. As long as there remains a subjective component in sentencing, "not only will no two defendants be seen identical by the sentencers, but no two sentencers will see a single case precisely the same." *McCleskey* v. *Kemp*, 753 F.2d 877, 894 (11th Cir. 1985).

The Gross and Mauro study has been rejected by the Fourth Circuit which stated, "[T]he Virginia statistics . . . presented are wholly inconclusive." *Briley* v. *Booker*, 746 F.2d 225, 227 (4th Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 286 (1984). A similar study by Gross and Mauro relating to the death penalty in Florida was rejected in *Sullivan* v. *Wainwright*, 721 F.2d 316 (11th Cir. 1983); and *Adams* v. *Wainwright*, 709 F.2d 1443 (11th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1432 (1984). Studies similar to those of Bowers and Pierce and Gross and Mauro have been found to be invalid and untrustworthy due to the substantial flaws in the data base. *See McCleskey* v. *Zant*, 580 F.Supp. 338, 360 (N.D. Ga.

1984) (Baldus study); *Shaw* v. *Martin*, 733 F.2d 304 (4th Cir. 1984) (Paternoster study). Likewise, generalized studies have been found wanting by members of this Court. Justice Powell writing in dissent from a stay of execution observed, "It should be apparent from the decisions of this Court since *Gregg* was decided that claims based merely on general statistics are likely to have little or no merit under statutes such as that in Georgia." *Stephens* v. *Kemp*, —— U.S. ——, 104 S.Ct. 562, 565 (1984) (Powell, J., joined by Burger, C.J., Rehnquist and O'Connor, J.J., dissenting).

The studies relied upon by Petitioner were produced by social scientists. Social science, however, is a nonexact science. Because of the limitations of such studies, courts must always be mindful that such research deals with highly complex behavioral patterns and institutions that exist in a highly technical society. The Bowers and Pierce study does not even purport to examine the administration of capital punishment in Virginia and "is simply too diffused in its depiction of likely community, hence juror, attitudes in this particular case to" demonstrate a likelihood of racial prejudice affecting the jury. *Turner* v. *Bass*, 753 F.2d at 355 (Phillips, J., concurring). The data base in the Gross and Mauro study is so flawed as to render the study meaningless. No amount of speculation, surmise or conjecture can substitute for evidence. Petitioner has presented no statistically significant evidence to show that the death penalty in Virginia is being applied discriminatorily.

CONCLUSION

In *Ristaino* v. *Ross*, this Court clearly held that a generalized *voir dire* was sufficient to expose bias and prejudice in the absence of a showing of special circumstances like

those in *Ham*. Petitioner does not challenge the continuing vitality of *Ristaino*. Therefore, this case represents nothing more than an application of the principles articulated in *Ristaino* and *Ham*.

In the case at bar, Petitioner has failed to establish any special circumstances which would have required the trial court to conduct a specific inquiry into racial prejudice. To the contrary, the evidence establishes that race was not an issue. Petitioner was unknown to the veniremen, and the evidence as to guilt and sentencing was overwhelming. Petitioner's jury was composed of four blacks, any one of whom could have assured him a sentence of life.

To accept Petitioner's position would require this Court to adopt a *per se* rule in capital cases and perhaps in non-capital ones as well. In every such case a specific inquiry into racial prejudice would be mandated. Such a rule is both unwarranted and unwise. It would serve to undermine that cherished principle that every person can obtain justice in our courts.

The Commonwealth respectfully submits that this Court should affirm the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

WILLIAM G. BROADDUS
Attorney General of Virginia

JAMES E. KULP
Senior Assistant Attorney General

ROBERT H. ANDERSON, III
Assistant Attorney General

Date: August 12, 1985

ADDENDUM

A. 1

AFFIDAVIT

State of Virginia, County of Northampton, to-wit:

C. E. GIBB, first being duly sworn, states as follows:

1. I am Clerk of the Circuit Court of Northampton County and was serving in this capacity in 1979 when Willie Lloyd Turner was tried in this County for the capital murder of Jack Smith, Jr..

2. The following four persons who served as jurors in Turner's case were black: Albert T. Christian; Charles R. Roselle; Kathy Ellen Bailey; and J. E. Worsley. Worsley also served as jury foreman.

C. E. GIBB

/s/ C. E. GIBB

Affiant

Sworn and subscribed to before me, a Notary Public, in and for the State of Virginia, County of Northampton, At Large, this 11th day of July, 1985.

KATHERYN B. BELOTE

/s/ KATHERYN B. BELOTE

Notary Public

My commission expires: Aug. 1, 1987.

EDITOR'S NOTE

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IN THE

SUPREME COURT OF THE UNITED STATES

NOV 22 PAGE 22

October Term, 1984

WILLIE LLOYD TURNER,

Petitioner,

v.

ALLYN R. SIELAFF, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

REPLY TO MOTION TO
STRIKE EX PARTE AFFIDAVIT

Now comes your Respondent, by counsel, and prays this Court to deny Petitioner's Motion to Strike the affidavit of Clyde Gibb, Clerk, Circuit Court of Northampton County, and further deny Petitioner's request to submit affidavits.

In his Motion to Strike, Petitioner concedes that he inserted in his opening Brief many factual statements which were not a part of the record in order to supply this Court with the "local flavor" which courts closer to the scene would already possess. (Motion, p. 1). These include Petitioner's references to the number of death sentences in Virginia, the racial composition of inmates on Virginia's death row, and cases in which the trial court imposed a sentence of life imprisonment after the jury had fixed punishment at death. (Petitioner's Brief, p. 31 and n. 6). As these assertions were readily verifiable, Respondent has accepted them, with the exception of the representation that Robert McClark was white, (Respondent's Brief, p. 26 n. 26), a fact which Petitioner now concedes was in error. (Motion, p. 2 n. 1). Equity and fundamental fairness

should dictate that Petitioner should not be heard to complain about that which he freely admits to having initiated.

The affidavit which Petitioner seeks to strike provides this Court with the actual racial makeup of the jury at Petitioner's trial. The racial composition of Petitioner's jury is an irrefutable historical fact which was open and obvious to everyone at Petitioner's trial.[1] While the fact of the composition of Petitioner's jury may not technically be within the scope of judicial notice, it is so close to it that it should be likewise accepted. This Court should apply the rule set forth in Muller v. Oregon, 208 U.S. 412, 421 (1908), wherein the Court stated, "[W]e take judicial cognizance of all matters of general knowledge." See Stern and Gressman, Supreme Court Practice § 13.11, at 717 (5th ed. 1978).

Petitioner suggests that the affidavit should not be accepted since it has not been tested in the crucible of the trial court. The information in the affidavit relates, however, solely to irrefutable facts which would not give rise to the necessity for testing in an adversary proceeding.[2] For this reason Petitioner's reliance upon Adickes v. Kress and Co., 398 U.S. 144 (1970), and Hopt v. Utah, 114 U.S. 488 (1885), is misplaced.

In his opening Brief Petitioner has asserted for the first

---

[1]While Petitioner has stated that he has not attempted to determine the correctness of Mr. Gibbs' affidavit, his own representations confirm the accuracy of the affidavit. The Petitioner represents that before the parties exercised their peremptory strikes the venire was composed of 7 blacks and 13 whites. Exercising their peremptory strikes Petitioner struck 4 whites and the prosecutor struck 3 blacks and 1 white, leaving a jury composed of 4 blacks and 8 whites. (Motion, p. 7).

[2]Petitioner cites his misstatement about the race of Robert McClark as an example of why the affidavit should be struck. (Motion, p. 2 n. 1). Petitioner's failure to verify the information he furnished this Court should not bar the acceptance of admittedly correct information.

Petitioner also refers to People v. Motton, 217 Cal. Rptr. 416 (1985), for support. Rather than supporting Petitioner, this case shows why the affidavit should not be struck. In Motton the California Supreme Court incorrectly assumed that no blacks were on the jury which convicted Motton. In this case there is no reason for this Court to assume anything, as the affidavit sets forth the facts clearly and accurately.

time his reliance upon most of the ten factors he sets forth on pages 13-14 and has expanded his reliance upon the historical background of capital punishment. In view of these shifts in Petitioner's arguments Respondent has deemed it appropriate to bring to this Court's attention the actual setting in which Petitioner's trial was conducted. This was the purpose underlying the affidavit in question. Respondent feels bound to bring to the Court's attention historical facts which relate to the issues before the Court. Cf. Fusari v. Steinberg, 419 U.S. 379, 390-391 (1975) (Burger, C.J., concurring).

Petitioner urges that Mr. Gibbs' affidavit be struck since Respondent will allegedly ask the Court to use the information to speculate about what went on in the jury room. Respondent has not sought in his Brief to have this Court engage in speculation about what occurred in the jury room, nor is this the purpose of the affidavit. The affidavit simply affords the opportunity for this Court to have before it relevant information in order that its decision be based upon the indisputable facts as they existed at the time of Petitioner's trial.

The Court should not allow the Petitioner to submit the affidavits of Craig T. Haney and Thomas Woodward. Unlike the affidavit of Mr. Gibbs, the affidavits of Haney and Woodward would not be a mere recitation of indisputable fact but would consist of untested opinions and statements pertaining to the thought processes of Petitioner's trial counsel.

Respondent Allyn R. Sielaff respectfully prays that Petitioner's Motion To Strike the affidavit of Clyde Gibb be denied and further that Petitioner not be granted leave to file affidavits of Craig Haney and Thomas Woodward.

ALLYN R. SIELAFF

By: James E. Kraft
Counsel

James E. Kulp
Senior Assistant Attorney General
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MAILING CERTIFICATE

I, James E. Kulp, a member of the Bar of this Court, hereby state under oath that I have today mailed, by first class postage prepaid, ten (10) copies of the foregoing Reply to Motion to Strike Ex Parte Affidavit to the Clerk of this Court, and further that I have mailed, by first class postage prepaid, one (1) copy of the foregoing to J. Lloyd Snook, III, Esquire, 230 Court Square, Charlottesville, Virginia 22901, this 18th day of November, 1985.

James E. Kulp

STATE OF VIRGINIA

CITY OF RICHMOND, to-wit:

The foregoing was sworn and acknowledged before me this 18th day of November, 1985, by James E. Kulp.

My commission expires: 9-19-87.

Notary Public

Commissioned as Cynthia A Lee

Supreme Court, U.S.
FILED
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(7)

No. 84-6646

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIE LLOYD TURNER,
Petitioner,

v.

ALLYN R. SIELAFF, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. PETITIONER'S RIGHT TO EXCLUDE RACIALLY PREJUDICED PEOPLE FROM HIS JURY CAN ONLY HAVE MEANING IF HE HAS A RIGHT TO LEARN WHO THOSE PEOPLE ARE.

Petitioner has argued that the real question presented here is whether he has a right to know if any member of his jury panel believes that the fact that he killed a white man makes him more deserving of death than if the murder had been committed by a white man. Respondent concedes that Willie Turner had such a right:

> Petitioner asks whether he had a right to know if racially biased individuals were on his jury. Not only Petitioner, but all defendants, are guaranteed this right. The *voir dire* conducted in this case was sufficient to address this issue and was consistent with the *voir dire* approved by this Court in *Ristaino*.

Brief of Respondent 31. Having conceded that such a right exists, the next question is whether there is *anything* in the *voir dire* that was conducted that even begins to suggest to a potential juror that his racial biases may be brought into play.

According to court records, the typical juror in this case would have been a 54-year-old woman.[1] She could see that Willie Turner is black, but she did not know Jack Smith, the man who was killed, and she had no idea of Smith's race. She grew up in the Jim Crow South, and it is a fairly safe bet that only those three jurors under 30 attended integrated schools.

Judge Godwin asked each juror the same questions:

1. Are you related by blood or marriage to either of the attorneys in this case, to the defendant or to the alleged victims, either Alan Bain or W. Jack Smith, Jr.?

2. Do you know anything about this case?

---

[1] The median age was 53.5, and eight of the twelve jurors were women.

3. Are you related by blood or marriage to any person who is employed as a police officer or any other law enforcement agency?

4. Have you or any members of your family been a victim of any crime?

5. Do you have any religious or conscientious scruples or objections against the imposition of a sentence of death?

6. Do you know any reason whatsoever why you cannot render a fair and impartial verdict in these cases, either for the defendant or for the Commonwealth of Virginia?

7. Do any of you know any reason whatsoever why you should not sit as a member of the jury in this case?

App. 16-17.

Was there anything in those questions that should have told our typical juror that Jack Smith was white? Was there anything in those questions that should hve told her that she was being asked if she thought a black who killed a white should be sentenced to death?

Respondent claims that the above questions (except for the death-qualifying question, all of them are required to be asked of all jurors in every criminal case in the Commonwealth) were adequate to guarantee to Willie Turner the right to know if his venire included people who believed that blacks who have killed whites should be executed. Brief of Respondent at 14. Respondent suggests that because the jurors knew that Turner was black, all of the jurors were on notice to ponder whether they believed that the death penalty was particularly appropriate if Willie Turner had killed a white man. Brief of Respondent at 13. Respondent apparently imagines that the jurors, having been asked about whether they knew of any reason that they could not be impartial, would look at Willie Turner, and would then say to the judge, "No, but if Jack Smith turns out to be white, I will vote to execute him."

Jurors can only answer the question that is asked of them. They cannot be expected to speculate about the facts of the case before they exclude all possible theories of bias or prejudice. The only way to be sure that jurors disclose their biases or prejudices is to ask them.

Nothing in the *voir dire* in this case guarantees Petitioner his conceded "right to know if racially biased individuals were on his jury." Brief of Respondent 31.

II. THIS COURT NEED NOT OVERRULE *RISTAINO* v. *ROSS*, 424 U.S. 589 (1976), TO RULE IN PETITIONER'S FAVOR.

In considering this case, this Court must either overrule, distinguish, or apply *Ristaino* v. *Ross*, 424 U.S. 589 (1976). Regardless of how this Court compares this case and *Ristaino* v. *Ross*, this Court should rule in Petitioner's favor.

Throughout his brief, Respondent has attemped to suggest that Petitioner cannot prevail unless this Court overrules *Ristaino* v. *Ross*. That is simply not true. We have suggested a number of ways that *Ristaino* v. *Ross* might be distinguished, and the ten factors cited in our Opening Brief are all factors to consider in applying *Ristaino's* case-by-case analysis. Obviously, if this Court were to overrule *Ristaino* v. *Ross*, Petitioner would be delighted. But we have not asked this Court to do so, because this Court need *not* do so to find in Petitioner's favor.

A. Though It Need Not Do So To Rule In Petitioner's Favor, This Court Could Establish A Per Se Rule In Capital Cases.

1. This Court has recognized that capital cases are different procedurally.

The linchpin of this Court's Eighth Amendment jurisprudence since *Furman* v. *Georgia*, 408 U.S. 238 (1972), has been that "death is different."

> We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.

Lockett v. *Ohio*, 438 U.S. 586, 604 (1978), quoting *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976). In *Strickland* v. *Washington*, ___ U.S. ___, 104 S.Ct. 2052 (1984), this Court recognized that the standard of competency of counsel is contextual (*see also McMann* v. *Richardson*, 397 U.S. 759, 770-771 (1970)), and therefore that counsel may be required to do in a capital case what he would not be required to do in a non-capital case. Although the standard for counsel's effectiveness does not differ from case to case, how that standard is applied in a particular case will depend in part upon the nature of the proceeding and the punishment at stake.[2]

The standard of effective assistance—the "reasonable range of competence" test—still applies in capital cases, but the actions necessary to satisfy that standard will differ, depending, in large part, upon the punishment at stake. Similarly, the standard under the Sixth Amendment is the same, whether the case is a capital case or a larceny case—all defendants are entitled to a trial "by an impartial jury"—but the actions that may be necessary to obtain that impartial jury will differ from case to case.

The guarantee of an impartial jury includes the guarantee of a jury composed of twelve people who can follow the instructions of the trial judge. That guarantee attaches in both capital and non-capital cases, and the legal standard is the same in all cases. In jury-sentencing states such as Virginia, a jury may sentence a grand larceny defendant to any sentence from one

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[2] In *Powell* v. *Alabama*, 287 U.S. 45 (1932), this Court extended the right of counsel to defendants charged with capital crimes some thirty-one years before that same right was extended to all felony defendants in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and ultimately to misdemeanants in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972).

day in jail to twenty years in the penitentiary, *Va. Code Ann.* § 18.2-95 (1950), but no authority requires *voir dire* to allow the Commonwealth to strike any juror who says that he cannot impose the maximum sentence. But in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), this Court approved *voir dire* to allow the Commonwealth to strike any juror who stated that he could not impose a death sentence.[3]

All that we ask here is that this Court recognize that, just as a capital case imposes certain burdens upon *counsel* that may not be relevant in a larceny case, the unique characteristics of a capital case impose certain burdens upon the trial *judge* that might not be relevant in a non-capital case.

2. The decision to impose the death sentence is not an objective decision.

Ristaino v. *Ross* involved a jury whose only duty was to determine guilt or innocence, a decision that is susceptible of some degree of objective analysis. The decision whether to impose the death sentence is not such an objective decision. The effect of this Court's holding in *Lockett* v. *Ohio*, 438 U.S. 586 (1978), is that juries must always be left free to engage in jury nullification,[4] and that the defense has a right not only to argue for jury nullification, but also to have an instruction to the jury legitimizing it. The Virginia Supreme Court has acknowledged that a capital jury may impose a life sentence for any reason at all, or for no reason at all. *Smith* v. *Commonwealth*, 219 Va. 455, 480, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979), *cert. granted on other issues sub nom. Smith* v. *Sielaff* (No. 85-5487) (October 21, 1985).

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[3] The Defendant is also entitled to use *voir dire* to learn if there is any juror who believes that death is the only appropriate punishment. *Patterson* v. *Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981).

[4] By "jury nullification" we mean that the jury may render a verdict in favor of the defendant for reasons not based on law or fact, but rather on emotion or sympathy for the defendant.

If the jury is going to be given that discretion, and if it is fairly predictable that a significant number of potential jurors may harbor prejudices which may raise questions about how they are to make the decision required of them, it makes sense to require that the jurors be questioned about such prejudices.

3. A rule requiring *voir dire* on racial prejudice does not require *voir dire* on other kinds of prejudice.

Respondent's real objection is that racial prejudice does not differ in any meaningful way from any other kind of prejudice—prejudice on account of religion, gender, or, perhaps, facial hair (*see Ham* v. *South Carolina*, 409 U.S. 524 (1973))—and therefore a *per se* rule requiring racial *voir dire* is the first step on the road to chaos.

> The adoption of a rule based solely upon a perspective of historical discrimination could not be limited to race but would apply with equal force to questioning about religious affiliation, ethnic origin, sex or national origin.

Brief of Respondent 14.

Respondent suggests, in essence, that the historical discrimination against blacks in this country is equivalent to the historical determination in this country based on religious affiliation, ethnic origin, sex or national origin. This is manifestly not so. This nation fought a civil war, in large part over the question of whether blacks should be enslaved. The Thirteenth, Fourteenth and Fifteenth Amendments to the United States were passed to end that "historical discrimination." More recently, seven members of this Court, including the dissenters, explicitly recognized in *Furman* v. *Georgia*, 408 U.S. 238 (1972), that the death penalty had historically been applied in a racially discriminatory fashion. Although discrimination on the basis of sex and religious affiliation is certainly to be condemned, it has never been practiced with the virulence and consistent malice with which racial discrimination has been practiced in this country. Though Jews, Catholics, Italians, Chinese, and other minorities have been discriminated against,

they have not been enslaved. Prejudice against them has not provoked lynchings and race riots.[5]

Respondent relies heavily upon this Court's footnote in *Ristaino* v. *Ross*,:

> In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion. See *Connors* v. *United States*, 158 U.S. 408, 415 (1895).

428 U.S. at 596 n.8, cited at Brief of Respondent 14. Petitioner respectfully suggests that this approach ignores the unpleasant reality that justice in the hands of a capital sentencing jury often *may*, without compensating procedural protections, turn in part "upon the pigmentation of skin." The whole purpose of the *voir dire* that we seek is to make sure that justice *does not* "turn upon the pigmentation of skin."

This Court recognized in 1972 that the death penalty statutes across the country had been applied in a racially discriminatory fashion. This case came to trial only seven years later. The demonstrations of the mobs outside the Virginia State Penitentiary (and outside other penitentiaries) at the execution of a black man who has killed a white man are simply the most vivid proof that racial prejudice is still alive.[6]

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[5] This Court has been able to draw lines when applying the Fourteenth Amendment equal protection guarantees; some forms of discrimination have been treated more harshly than others. Discrimination on the basis of race, for example, has always been subject to strict scrutiny, *See Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Hunter* v. *Erickson*, 393 U.S. 385 (1969). The same scrutiny has not been applied to cases of discrimination on account of gender. *Reed* v. *Reed*, 404 U.S. 71 (1971); *Kahn* v. *Shevin*, 416 U.S. 351 (1974).

[6] Respondent has suggested that the "Fry, Nigger, Fry" chants and the mobs waving nooses and Confederate flags outside the Virginia State Penitentiary mobs outside the Virginia State Penitentiary

B. Applying The Case-By-Case Analysis Of *Ristaino* v. *Ross*, The Facts Known To The Trial Judge At The Time Of Trial Were Sufficient To Require Inquiry Into Possible Racial Prejudice.

Respondent has argued that the factors mentioned in our Opening Brief supporting our claim were not known to the trial judge at the time of trial, and therefore the failure to ask the questions could not be regarded as an abuse of discretion. Brief of Respondent 13.

In fact, the trial judge knew that this was a black-on-white crime, that inflammatory pretrial publicity had required a change of venue to a distant county with which neither counsel nor the court was familiar, that counsel was not going to be permitted to participate in *voir dire* and that the scope of the *voir dire* would be extremely limited[7] and the number of

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when Linwood Briley and James Briley were executed were somehow unique to their cases. Brief of Respondent 21. When Morris Mason was executed on June 25, 1985, the crowd was smaller, but the same mob gathered. One woman carried a sign that read "Fry like bacon. Koon. Burn damn you." "Mason is executed 'with best of dignity'", Richmond News Leader 1 (June 26, 1985); "Last appeals fail; Mason executed," Richmond Times-Dispatch A-5 (June 26, 1985). The difference between the Briley mobs and the Mason mob was a difference in degree only. All three mobs illustrate the undeniable fact that there are people in Virginia who believe that the death penalty is particularly appropriate for blacks who have killed whites. All that we ask of this Court is that we be permitted to find out if any of those people were on our jury panel.

[7] Counsel for Respondent claims that Petitioner has misstated the length of the *voir dire*. Respondent has asserted that it took "in excess of 2½ hours." Brief of Respondent 19-20. In fact, *voir dire* began at 11:15 a.m. (Transcript of December 3, 1979 at 40), and the *voir dire* concluded at 1:15 p.m., at which time the court took a brief recess to allow counsel to think about their strikes (Transcript of December 3, 1979, at 99.) The court reconvened at 1:30 p.m., and the strikes were made; the court then recessed at 1:50 p.m. (Transcript at 102.) Of course, since the trial involved individual *voir dire*, much of

peremptory challenges small. In addition, Judge Godwin was surely familiar with the facts of the case, at least in broad outline, from having reviewed the press clippings on the change of venue motion and having ordered a psychiatric examination of Petitioner at state expense. He was also probably familiar with at least the broad outlines of the evidence concerning discriminatory application of the death penalty in the past,[8] though he apparently regarded such evidence as irrelevant.

Many of the other factors—the facts that Virginia allows the fewest peremptory challenges of any state in the Union, that statistical evidence indicates that mid-range cases such as these show the most pronounced effects of racial prejudice, that a jury recommendation of death is virtually conclusive, and that the Virginia Supreme Court has never found a death sentence to have been imposed under passion or prejudice—are directed primarily to an appellate court, to refute sugges-

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the time was wasted as jurors came and went, the judge repeated the preliminary questions, and counsel argued motions to exclude for cause. It makes little difference whether the figure is 2 hours or 2½ hours; the *voir dire* was short and was of neither the duration nor the breadth of even the *voir dire* in *Ristaino* v. *Ross*, 424 U.S. 589 (1976), or *Rosales-Lopez* v. *United States*, 451 U.S. 182 (1981).

[8] Judge Godwin had the Bowers and Pierce study (Bowers and Pierce, "Preliminay Tabulations Reflecting Arbitrariness and Discrimination under Post-*Furman* Capital Statutes" (1979) (Defendant's Exhibit One) (App. 44-69)) in front of him already. It also seems likely that he, having practiced law in Virginia and having been a judge in Virginia for many years, would be aware of the general factual outlines of this claim, particularly after *Furman* v. *Georgia*, 408 U.S. 238 (1972). In saying this, we do not contend that Judge Godwin knew specifically that 87% (202 of 236) of those executed in Virginia between 1908 and 1962 were black, *see* Note, "Capital Punishment in Virginia," 58 *Va. L. Rev.* 97-142 (1972), but he surely was aware of the general basis for counsel's concern about racial prejudice and discrimination.

tions that the error was harmless or that Virginia's post-*Gregg* statutes adequately protect against passion and prejudice.

Knowing what he did about the case, Judge Godwin should have permitted *voir dire* on racial attitudes.

III. RESPONDENT'S TREATMENT OF THE EVIDENCE OF HISTORICAL DISCRIMINATION REFLECTS A FUNDAMENTAL MISUNDERSTANDING BOTH OF THE EVIDENCE ITSELF AND OF THE PURPOSE FOR WHICH IT IS OFFERED.

Respondent's attacks on the Gross-Mauro study[9] miss the point of why the study was referred to in this argument at all. Respondent dismisses Petitioner's evidence of the historical discrimination in the imposition of the death sentence with the following argument:

> At a minimum this Court's decisions in *Gregg*, *Proffitt* [v. *Florida*, 428 U.S. 242 (1976)] and *Jurek* [v. *Texas*, 428 U.S. 262 (1976)] stand for the proposition that states may separate themselves from historical backgrounds concerning capital punishment by the enactment of statutory schemes which provide focused attention on the particular defendant and his crime. Since 1977, Virginia has been proceeding under such a constitutional scheme and must be judged upon the manner in which the death penalty is presently being imposed rather than upon what may have occured in the distant past.

Brief of Respondent 17.

If Respondent's argument is that the enactment of a post-*Gregg* scheme means that an Eighth Amendment claim of discriminatory application must start with new statistics, accumulated beginning with the passage of the new statute, Respondent is certainly correct. We are not arguing that the

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[9] Gross and Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization* (unpublished study) (October, 1983) (App. 33), now published with only minor revisions at 37 *Stan. L. Rev.* 27 (1984).

entire statute must be stricken, or that it is impossible ever to apply fairly a death penalty statute.

We accept this Court's decisions in *Gregg* v. *Georgia*, 428 U.S. 153 (1976), and subsequent cases, holding that the death sentence may be imposed if procedural protections are enacted to eliminate passion and prejudice.[10] We have offered these statistics, therefore, not to assail the structure of the statute, but to illustrate human nature. Statutes vary from state to state; people do not. Statutes may change with the stroke of a pen; changes in social attitudes may require a generation or more to complete.

Jury decision-making is a function of law and of juror psychology. The pre-*Furman* statutes were facially neutral as to race, so the discriminatory impact must necessarily reflect a discriminatory psychology. Though the death penalty statutes before *Furman* did not adequately channel the juries' discretion, it was not the statutes that caused blacks to be executed more often than whites before 1972—it was the jurors. It was not the unitary jury trial that sentenced to death those who killed whites more often than those who killed blacks—it was the jurors.

Gregg, *Proffitt* and *Jurek* state that it is possible to enact and enforce a death penalty statute in a non-discriminatory manner, but both those cases and subsequent cases (*see, e.g.*, *Godfrey* v. *Georgia*, 446 U.S. 420 (1980)) make it clear that the States can only apply such statutes if adequate care is taken to

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[10] The dissenters in *Furman*, led by Justice Powell, believed that the statistics were distorted by many death sentences imposed when blacks were kept off juries, and before other constitutional protections were extended to even the odds. But even the dissenters would presumably agree that the pre-1972 data shows that a judicial system that leaves to the unfettered discretion of whites the decision of when blacks should die will result in a disproportionate number of blacks being sentenced to death.

guard against passion and prejudice. That protection begins with thorough *voir dire*.

This Court cannot by judical fiat change the hearts and minds of two hundred million Americans. Perhaps many years from now this Court may determine that years of non-discriminatory application support the conclusion that our society has changed—that racial prejudice no longer influences the decisions about who dies. But this Court cannot assume that the discrimination that so troubled it in 1972 had vanished by 1979.[11]

Because we are not claiming that Virginia's post-*Gregg* statute has been discriminatorily applied, but rather only that people subject to being called as jurors may harbor racial prejudices that will directly affect their ability to decide punishment fairly, the fact that we have no compelling data with statistical significance establishing discriminatory application of the Virginia statute is not fatal. All that we have ever tried to suggest is that racial prejudice still lingers, that that prejudice manifests itself in capital cases, and that Virgi-

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[11] We have acknowledged that the racial climate in this country has generally moderated in the last generation, particularly in the South. Perhaps the single most important force for moderation has been the desegregation of public schools pursuant to this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Respondent cites our admission of this moderation as being an indication that the discrimination which we seek to eliminate from our juries is not in fact present.

Of the twelve jurors, only three are of such an age as to make it likely that they attended integrated schools. Based on the ages listed in court records for each of the jurors who in fact served, the median age of the jurors is 53.5 years (at time of trial), and only Virginia Ruth Merritt (age 22), Kathy Ellen Bailey (age 21) and James Warren Smith (age 28) would have had any chance in Virginia of attending integrated schools. The moderating influence of an education in integrated schools is unlikely to have made much of an impact on most of the rest of the jurors.

nians are just as human as the citizens of neighboring states.[12] Gross and Mauro's study and Bowers and Pierce's study relate only partly to the statutes in the states studied. The implications of their studies are not legal but sociological.

Respondent criticizes the Gross-Mauro study because:

1. "It utilizes overly general information from which to draw specific findings." Brief of Respondent 32.

2. "The Study lacks statistical validity because it does not adequately compare murders of similar atrocity." *Id.*

3. "The Gross and Mauro study has been rejected by the Fourth Circuit" because the Virginia data presented "are wholly inconclusive," quoting *Linwood Briley* v. *Booker*, 746 F.2d 225, 227 (4th Cir.), *cert. denied*, ____ U.S. ____, 105 S.Ct. 286 (1984). Brief of Respondent 33.

At the outset, it should be noted that the cases cited by Respondent at pages 32-34 of his Brief either did not involve the Gross and Mauro study or did not include an evidentiary hearing at which the Gross and Mauro study could be properly and fairly subjected to scrutiny. We made a proffer to the United States District Court which was never countered with either facts or expert analysis. Respondent, having opposed efforts to have an evidentiary hearing on the question of discriminatory application, has no expert analysis in the record on which to base his attacks on the Gross-Mauro study, and he cannot remedy the lack of record support for his assertions by quoting the criticisms of other courts of other studies.

In any event, those criticisms are unfounded. Respondent's first complaint is that Gross and Mauro looked at

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[12] We had sought any evidentiary hearing at which we might offer testimony from psychologists and sociologists that would indicate that the patterns of behavior of Virginians do not differ significantly from the patterns of behavior of citizens of other states, but that request for a hearing was denied.

> all homicides, not just those for which capital punishment is statutorily authorized. . . . The Study, therefore, is comparing capital murders with deaths from motor vehicle accidents, family disputes and the like.

Brief of Respondent 32. This point has superficial appeal, but it is relevant only if the deficiency in the scope of the sample was itself responsible for the statistical disparity.

One of the assumptions that one must make before the Gross-Mauro study is to be used in the death penalty debate is that the ratio of death-eligible crimes to all crimes studied will be essentially the same for a given combination of race of suspect and race of victim. There is no reason to believe that this assumption is not valid.

Respondent's objection can only be found to have merit if it can be shown that the figures applicable to death-eligible cases show essentially equal chances of receiving the death sentence for the various combinations of race of victim and race of suspect, and therefore that the disparity found over a sample that contains both death-eligible and non-death-eligible cases (motor vehicle accidents, family disputes, second degree murders, barroom brawls, murders in the course of a burglary, murders in which the robbery was not consummated, etc.) is explained by disparities in the non-death-eligible class. To explain the disparities while assuming a fair application of the death sentence, it would be necessary to show that:

—few blacks kill whites in non-death-eligible situations;

—most whites kill whites in non-death-eligible situations;

—most blacks kill blacks in non-death-eligible situations;

—all whites who kill blacks do so in non-death-eligible situations.

There is, of course, no such evidence in the record, and it is not the sort of topic on which this Court should speculate.

Respondent is simply wrong in stating that the study of Dr. Raymond Paternoster, "Race of Victim and Location of Crime:

The Decision to Seek the Death Penalty in South Carolina," 74 *J. Crim. L. & Criminology* 754 (1983), included non-death-eligible cases. In fact, Dr. Paternoster was very careful in selecting his sample:

> Rather than examine the decision to seek a death sentence using the total pool of all homicide cases, the analysis will focus primarily on statutorily defined "death eligible" cases.

Id. at 765. *See also* Note, "Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-*Furman* Murder Cases in Dade County, Florida, 1973-1976," 33 *Stan. L. Rev.* 75 (1980). Dr. Paternoster's study was limited to "death-eligible" cases, and his conclusions were the same as those rendered by Gross and Mauro.

Respondent's second criticism of the Gross-Mauro study is that "it does not adequately compare murders of similar atrocity." Respondent here cites *Shaw* v. *Martin*, 733 F.2d 304, 312 (4th Cir.), *cert. denied*, ___ U.S. ___, 105 S.Ct. 555 (1984), but Respondent does not tell this Court that the criticism of the Fourth Circuit was directed towards Paternoster's study, not Gross and Mauro's study. The Gross-Mauro study did attempt to control for "three major legitimate predictor variables": whether there was an accompanying felony, the relationship of the suspect to the victim, and the number of victims. 37 *Stan. L. Rev.* at 75. Comparing those aggravating factors, and comparing comparable cases, Gross and Mauro found that the racially discriminatory disparities remained. *Id.* at 95. The failure of the study to separate out cases of murder in the commission of a burglary (not a capital offense in Virginia), *see* Brief of Respondent at 32-33, is likely to be irrelevant unless there is some reason to believe that blacks who commit murder in the course of a burglary are less likely to kill whites than other combinations of victim and suspect.

Obviously, Gross and Mauro cannot control for the amount of blood on the floor or the number of shots fired, but such individual case features either even out or fade into insignifi-

cance in a large statistical sample. On the average, a white probably bleeds about as much if shot by a white as if shot by a black, and one might also suspect that, on average, the number of shots fired when a black kills a white is likely to be the same as when the killing is done by a white.

The study does not compare "murders of similar atrocity" with figures kept separately for one gunshot, for two gunshots, and so on, but then the entire point of the Gross-Mauro study was to go beyond case-by-case comparisons and to evaluate the statistics from across the country, assuming, as social scientists must always do, that if the size of the sample is large enough, there will be "murders of similar atrocity" in the different categories of race of victim and race of suspect. Unless there is some indication that blacks are more likely to commit atrocious murders against whites, and that whites never commit atrocious murders against blacks, Respondent's objection cannot explain the statistical disparities, and cannot affect the validity of the study's conclusion.

It is precisely this concern that a statistical study must have a large number of cases to draw from before it becomes statistically significant that causes the authors of the study to be cautious about inferring too much from the Virginia data. They acknowledge that the Virginia data is insufficient to allow an independent conclusion that the Virginia death penalty is being discriminatorily applied. However, the authors say, Virginia must be looked at in conjunction with the other states.

> Some of the racial disparities that we report would not, on their own, constitute convincing proof of racial discrimination; this is particularly true for Arkansas and Virginia, in each of which we study fewer than twenty death sentences. If we were examining the data from one of the states separately from the rest we would conclude that there is good reason to *suspect* racial discrimination in capital sentencing—*indeed, that it is more likely than not*—but that it is too early to tell for sure. But we are not considering these states in isolation, and we are not primarily interested in determining the existence of racial discrimination in any particular state.

App. 34-35 (emphasis added).

We will acknowledge, as we have acknowledged at every step of the way, that the Virginia statistics from the Gross-Mauro study are not sufficient to provide a basis for overturning the statute as being discriminatorally applied. That is not the claim before this Court, however. The state-by-state analysis may be important to discriminatory application claism, because some state's statutes may do a better job of screening racial discriminatory prosecutions, or because appellate review in one state may be more careful than in another state. However, where our claim deals only with human nature, and not with statutes, the cross-state comparisons are valid.

IV. THE PRESENCE OF BLACKS ON THE JURY, EVEN IF THE AFFIDAVIT OF CLYDE GIBB MAY BE CONSIDERED BY THIS COURT, IS NO GUARANTEE THAT THERE WAS NO PREJUDICE IN THE JURY ROOM.

Respondent has attached to his Brief an "Addendum" consisting of the *ex parte*, extra-record affidavit of Clyde Gibb, Clerk of the Circuit Court for Northampton County, concerning the racial makeup of the jury. That affidavit is the subject of a motion to strike, filed contemporaneously herewith. The impropriety of that action is dealt with in that motion, and that point will not be reargued. However, the suggestion (Brief of Respondent 19, 21) that the presence of blacks on the jury guaranteed that there would be no prejudice is illogical.

A criminal defendant is entitled by the Sixth and Fourteenth Amendments to the United States Constitution to have twelve unbiased jurors. As this Court noted in *Parker* v. *Gladden*, 385 U.S. 363, 366 (1966), "Petitioner was entitled to be tried by twelve, not nine or ten, impartial and unprejudiced jurors." *See also Davis* v. *Georgia*, 429 U.S. 122 (1976). The fact that four of the twelve jurors were of the same race as the defendant is

hardly a substitute for *voir dire* sufficient to determine whether the veniremen were in fact biased.

This Court has expressly refused to presume, as Respondent asks this Court to do, that the presence of blacks in the jury room will or did prevent racial prejudice from being a factor in the decision to ignore death. In *Castaneda* v. *Partida*, 430 U.S. 482, 499 (1977), this Court rejected the argument that a *prima facie* case of discrimination against Mexican-Americans in grand jury selection is rebutted solely by showing that Mexican-Americans govern the county in question.

> Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group. Indeed, even the dissent of Mr. Justice Powell does not suggest that such a presumption would be appropriate. . . . The problem is a complex one, about which widely differing views can be held, and, as such, it would be somewhat precipitate to take judicial notice of one view over another on the basis of a record as barren as this.

As Justice Marshall noted,

> Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority. Such behavior occurs with particular frequency among members of minority groups who have achieved some measure of economic or political success and thereby have gained some acceptability among the dominant group.

Id. at 503 (Marshall, J., concurring). Justice Powell's dissent, joined by the Chief Justice and Justice Rehnquist, was clearly limited to the specific facts of Hidalgo County, and the dissent did not "suggest that persons in positions of power can never be shown to have discriminated against other members of the same ethnic or racial group." *Id.* at 514 n.6 (Powell, J., dissenting).

If this Court will not make a presumption of fairness where the group claiming discrimination is in a majority, surely it is inappropriate to make a presumption of fairness where only 33% of the jurors are minority group members.

Of course, what Respondent is asking this Court to do is to speculate about what went on in the jury room. Efforts to call the jurors as witnesses to provide direct evidence about whether racial prejudice affected their deliberations would clearly be impermissible. *McDonald* v. *Pless*, 238 U.S. 264 (1915); *see* Federal Rule of Evidence 606(b). If direct evidence of the jurors' deliberations is impermissible, it is difficult to see why it should be permissible to introduce circumstantial evidence, which can only be made relevant if this Court indulges in wild speculation to take judicial notice of demonstrably false assumptions of human behavior. If the Respondent is truly serious about having this case turn on an effort to discern the actual thought processes in the jury room, the record is simply inadequate. This Court has refused to take judicial notice of the psychology of discrimination, *Castaneda*, *supra*, at 499, and the social science evidence appears to indicate that Respondent's assumption is in fact incorrect. *See* G. Allport, *The Nature of Prejudice* 150-153 (1954), and other sources cited at *Castaneda*, *supra*, at 503 nn.2, 3 (Marshall, J., concurring).

As we have stated in our motion to strike, we are prepared to prove, if this Court deems it relevant, that the four blacks on the jury consisted of one 21-year old woman of unknown occupation, one farm laborer, one Highway Department laborer, and an elementary school principal. If we are to speculate about the internal dynamics in the jury room, this speculation should include the likelihood that the first three blacks mentioned would not play a forceful part in the deliberations, whereas the last mentioned, Mr. Worsley, the foreman of the jury, might well be a black who has "achieved some measure of economic or political success" and has thereby "gained some acceptability among the dominant group." *Castaneda*, *supra*, at 503 (Marshall, J., concurring). Such a minority member may

discriminate against a black, in an effort to curry favor with the dominant group.

To get away from the factual muddle and to return to the law as enunciated by this Court, Willie Turner "was entitled to be tried by twelve, not nine or ten, impartial and unprejudiced jurors." *Parker* v. *Gladden*, 385 U.S. 363, 366 (1966).[13] Even if we accept the scientifically dubious proposition that blacks would not discriminate against other blacks, Respondent is in effect saying that Willie Turner had a right only to four impartial jurors. That is not the law of this land.

CONCLUSION

Willie Turner had a right to twelve impartial jurors, and he had a right to reasonable *voir dire* to secure that impartial jury. Those rights were denied him in his capital sentencing trial.

Petitioner prays this Court to reverse his death sentence and to return the case to the Circuit Court for the County of Southampton for a new sentencing hearing or a new trial for Willie Turner.

Respectfully submitted,

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[13] This is particularly true in a capital case in Virginia, where one juror holding out for life imprisonment means that the Defendant is sentenced to life imprisonment. In a capital case in Virginia, a non-unanimous decision *is* a verdict of life.